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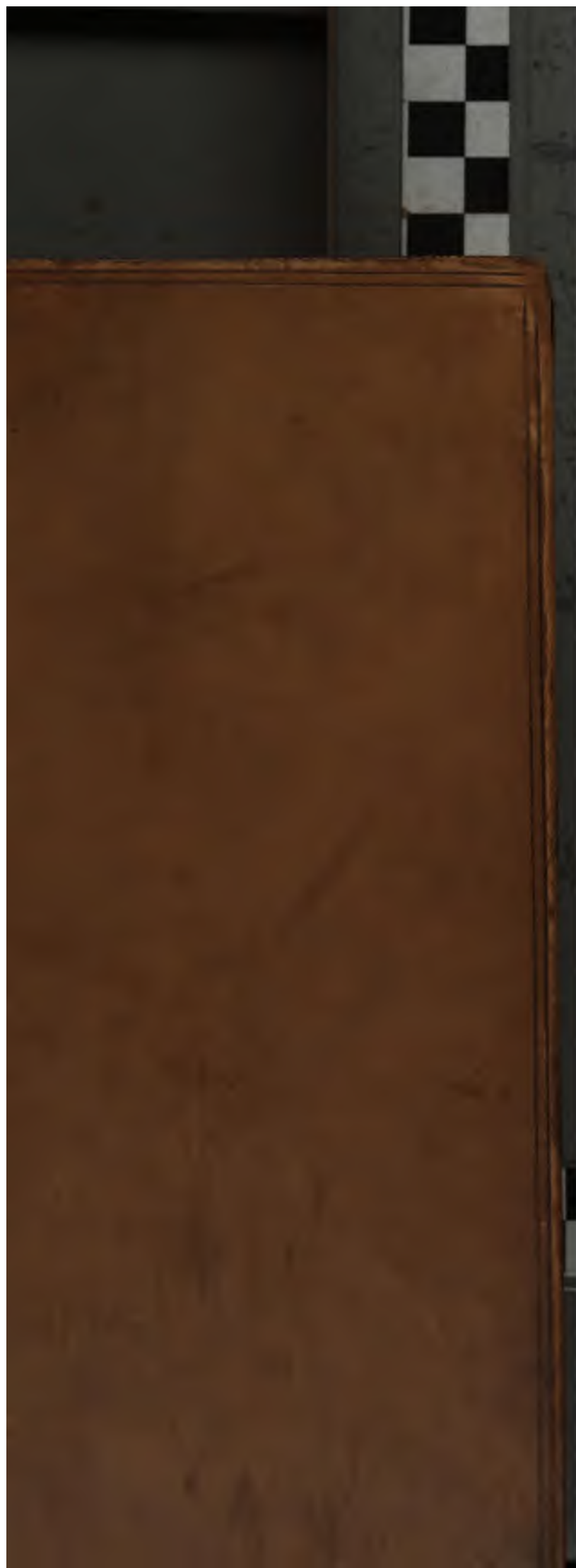
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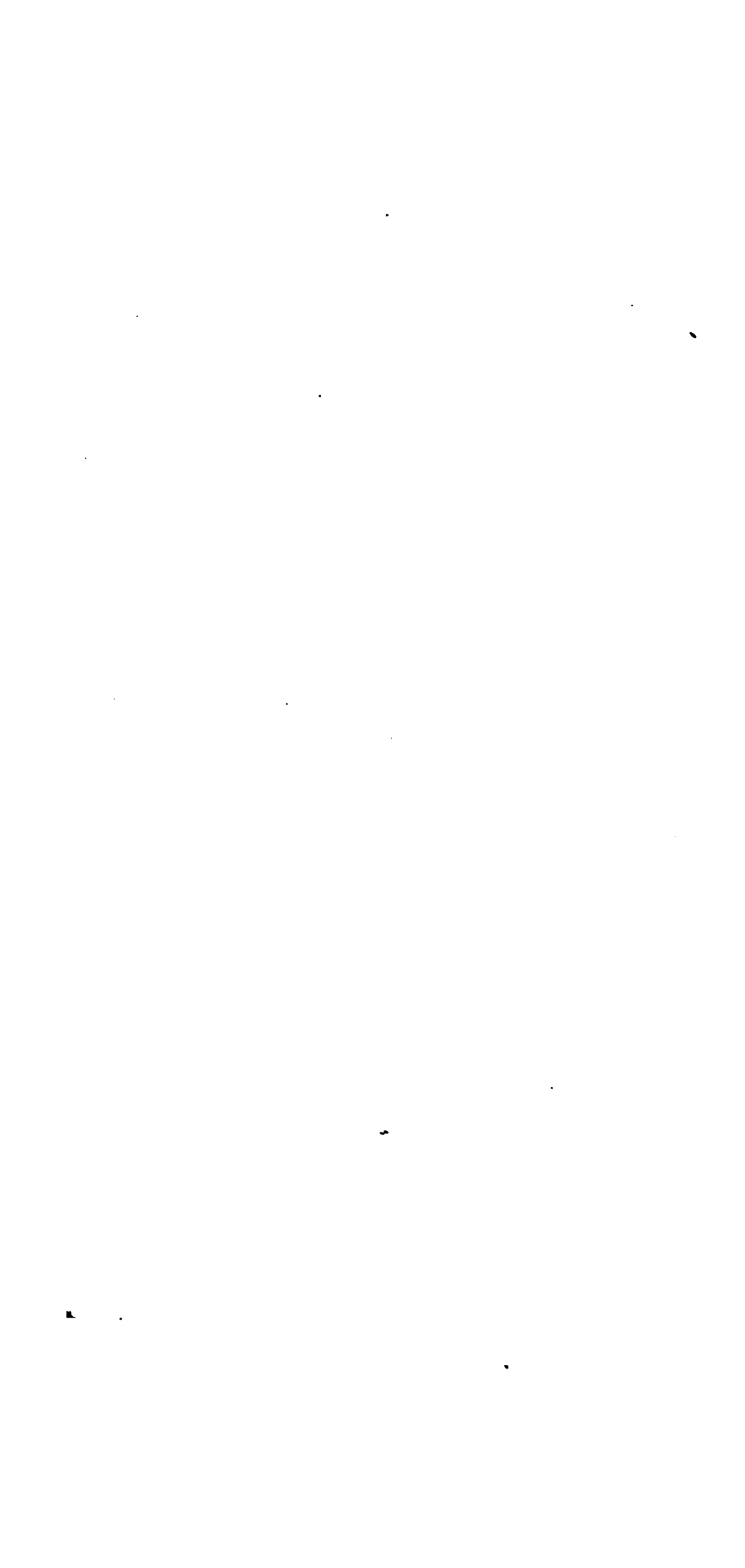
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THE
EXCHEQUER REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Courts of Exchequer & Exchequer Chamber.

VOL. X.

TRINITY TERM, 17 VICT., TO HILARY VACATION, 18 VICT.,
BOTH INCLUSIVE.

BY
E. T. HURLSTONE, OF THE INNER TEMPLE,
AND
J. GORDON, OF THE MIDDLE TEMPLE,
ESQUIRES, BARRISTERS-AT-LAW.

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ERRATA.

- Page 186, line 14, for shewed cause read in support of the rule.*
„ 341, last line, for Rule absolute read Rule accordingly.
„ 507, last line of text, for plantetur read plantatur.
„ 617, line 8 of marginal note, for and pro- read and several pro-.
„ 878, marginal note, for 1600l. read 1620l. passim.

Exchequer Reports.

TRINITY TERM, 17 VICT.

EVANS and Others v. EARLE.

1864.

May 29.

DEBT on bond.—The plea set out the bond, by which R. Plant and the defendant were jointly and severally bound to the plaintiffs in the sum of 400*l*. The condition recited an agreement between the members of the Provisional Direction of the Bombay, Baroda, and Central India Railway Company of the one part, and R. Plant of the other part, whereby it was agreed “that R. Plant should forthwith proceed to such place or places in the East Indies, at such time, and by such conveyance, as the said company should direct, and should there serve the said company as engineer and surveyor, at a salary of 4*l*. 13*s*. 4*d*. per month, to commence from the day of his *embarkation at Southampton*,” also “that the defendant had agreed to become security for R. Plant, for fidelity and trust;” and the condition was, “that, if R. Plant do and shall forthwith proceed to such place or places in the East

The defendant, as surety, executed a bond, the condition of which recited an agreement between the directors of an East Indian Railway Company and P., whereby it was agreed that P. should forthwith proceed to such place in the East Indies, at such time, and by such conveyance as the company should direct, and should there serve the company as engineer at a certain salary per month, to commence from

the day of his *embarkation at Southampton*. The condition was in the terms of the recited agreement but mentioned no place of embarkation. The company paid for the passage of P. to India, on board a vessel about to leave Southampton; but the bond not having been executed in sufficient time to enable him to go by that vessel, he was directed by the company to go by way of Marseilles, and to meet the vessel. He embarked at Dover, but never reached Marseilles, and in a short time returned to this country:—*Held*, that the condition of the bond was not restrained by the recital, and consequently that the surety was liable, notwithstanding the principal did not embark at Southampton.

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Indies, at such time and by such conveyance as the said company shall direct, and do and shall from time to time, and at all times thereafter, during the continuance of his employment by the said company, well and faithfully serve the said company as engineer and surveyor, and do and shall devote his whole time and attention to the duties of his office, at all times serving the said company with zeal and fidelity, according to the terms of the recited agreement," the bond shall be void. The plea then averred performance in the terms of the condition.

Replication—That R. Plant was directed by the said company to proceed forthwith, at a time and by a conveyance directed by the company, to a place in the East Indies directed by the company, to wit, Bombay; of all which premises R. Plant had notice, and could and might and ought to have obeyed and complied with such direction, and a reasonable time for so doing elapsed before this suit; yet R. Plant did not proceed to the place in the East Indies so directed, at the time and by the conveyance so directed or otherwise howsoever; and the said R. Plant not only failed to proceed to the East Indies, but also, before this suit, abandoned the service of the company.

The rejoinder took issue on the replication.

At the trial, before *Pollock*, C. B., at the London Sitings after last Hilary Term, it appeared that the company had paid for the passage of R. Plant to India, on board a vessel about to leave Southampton; but, the bond not having been executed in sufficient time to enable him to go by that vessel, he was directed by the company to proceed by way of Marseilles and so meet the vessel. The company paid him 125*l.* in advance of salary, and 5*l.* for travelling expenses. He embarked at Dover, but never reached Marseilles, and in about a fortnight returned to this country.

It was submitted on the part of the defendant, that, as surety, he was not liable for the misconduct of his princi-

pal, arising from the directions to go to Marseilles, since by the terms of the bond it was evident that the parties contemplated an embarkation from Southampton. The learned Judge directed a verdict for the plaintiff for 130*l.*, reserving leave to the defendant to move to enter a non-suit.

A rule nisi having been obtained accordingly,

Hawkins and *Henniker* shewed cause.—It was part of the duty of the principal to proceed to India according to the directions of the company, and, having failed to do so, the surety is liable. Southampton is mentioned in the bond as being the most likely place of embarkation for India, but the party was bound to proceed at such times and by such conveyance as the company should direct.

Collier in support of the rule.—As against the surety, the condition must be strictly construed. The obligation was entered into with reference to a fact well known to mercantile persons, viz. that vessels for India usually proceed from Southampton. A person might be willing to be bound for the fidelity of another who was about to proceed in a vessel from Southampton to India, but not if he was to go there by way of France. The bond must be read as conditioned for the faithful performance of his duties by the clerk, provided he went to India from Southampton.

ALDERSON, B.—The question in this case depends on the terms of the condition, which are, that the principal “shall forthwith proceed to such place or places in the East Indies, at such time and by such conveyance as the company shall direct.” Therefore the surety undertakes that the principal shall forthwith proceed to such place, at such time, and by such conveyance as the company shall direct. It may have been a matter of conjecture, that the party

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would most probably embark at Southampton, and proceed direct to India; but there is nothing to prevent the company from directing him to proceed by any other route; and it is clear that the parties did not contemplate that he should proceed solely by a sea voyage.

PLATT, B.—I am of the same opinion. All that the condition says, is, that the salary of the principal shall commence from the day of his embarkation at Southampton; and if an action were brought to recover the salary, there might perhaps be a question whether the party was entitled to it, unless he had embarked from Southampton. But that stipulation does not affect the obligation of the surety. He undertakes that the principal shall go where, when, and in what manner the company shall direct.

MARTIN, B.—I am of the same opinion; and moreover I think that, upon the pleadings, the plaintiff is entitled to recover. The defendant pleads performance in the terms of the condition. The plaintiff replies that the party did not proceed to the place, at the time, and by the conveyance directed by the company; and it was proved that he did not. It seems to me that no question is raised as to the party embarking at Southampton. But, further, I think that, under the terms of this condition, if the company had directed the principal to sail from London or any other place, the surety could not object.

POLLOCK, C. B.—When the condition of the bond is examined, it is evident that the surety is bound for the performance by the principal of the directions of the company as to the place of embarkation for India. He is told to go by way of Marseilles, and money is given him for that purpose; but he does not go to India at all.

Rule discharged (a).

(a) See *North Western Railway Company v. Whinray*, post, p. 77.

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WINSHIP v. HUDSPETH.

June 2.

TRESPASS for breaking and entering a messuage and yard of the plaintiff, and pulling down his wall.

Pleas: first, not guilty; secondly, as to breaking and entering the yard and pulling down the wall, that the defendant was possessed of a messuage, the occupiers whereof, for twenty years before this suit, enjoyed of right and without interruption a way on foot from a public highway over the yard of the plaintiff to the messuage of the defendant, and from the messuage of the defendant over the yard of the plaintiff to the said public highway, at all times of the year, for the more convenient occupation of the messuage of the defendant; and that the alleged trespasses in the introductory part of the plea mentioned were a use by the defendant of the said way. The plea then stated that, because the wall was wrongfully erected across the yard and obstructing the way, the defendant pulled it down.

The plaintiff joined issue on the first plea; and to the second new assigned, that the defendant on other and different occasions, for other and different purposes, and in other and different parts of the yard, out of the said way, committed the trespasses.—Plea to new assignment, not guilty; upon which issue was joined.

At the trial, before *Platt*, B., at the last Durham Assizes, the following facts appeared.—In the year 1823, one *Manners*, having purchased the land in question, erected upon it the two dwelling houses now belonging respectively to the plaintiff and the defendant. Behind each house there was a piece of ground appropriated as a yard,

In 1823, *M.* built two adjoining houses, behind each of which was a piece of ground appropriated as a yard, but no wall divided the yards. In 1832, *M.* permitted the defendant to occupy one of the houses without payment of rent, and he was accustomed to pass over the yard of the other house, which was let from time to time to different tenants, to a public highway. *M.* continued owner of both houses until his death in December, 1838. In August, 1839, the trustees under his will conveyed the last-mentioned house and the ground behind it to a person through whom the plaintiff derived his title. In September, 1839, the trustees conveyed the other house and ground to the defendant, who continued to oc-

cupy it, and use the way across the plaintiff's yard without interruption until the year 1853:—*Held*, that there was no user of the way "as of right" for twenty years, within the meaning of the 2 & 3 Will 4, c. 71, s. 2.

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but there was no wall dividing the two yards. In the year 1832, Manners, who was the father-in-law of the defendant, permitted him to occupy one of the houses without payment of rent; and the defendant was accustomed to pass over the yard at the back of the other house to a public highway. The latter house was let from time to time to different tenants. Manners continued owner of the property in question until his death in December, 1838. On the 20th of August, 1839, the trustees under his will conveyed the last-mentioned house and the ground behind it to one Mack, through whom the plaintiff derived his title by purchase. The conveyance to Mack contained no reservation of a right of way for the owners of the adjoining house. On the 12th of September, 1839, the trustees conveyed that house and ground to the defendant, who continued to occupy it without interruption, and use the way across the plaintiff's yard. In the year 1853 the plaintiff built a wall dividing the two yards, and the defendant knocked down the wall, which was the trespass complained of.

It was submitted on behalf of the defendant, that he had acquired a right to the way by twenty years' uninterrupted user. The learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

Manisty, in last Easter Term, obtained a rule nisi accordingly; against which

Knowles and *Unthank* now appeared to shew cause; when the Court called on

Manisty to support the rule.—Under the 2 & 3 Will. 4, c. 71, s. 2, the defendant acquired a right to the way in question by the uninterrupted enjoyment for twenty years Unity of seisin in the owner of the two houses during a portion of the period does not prevent the right from at-

taching. If, instead of the defendant purchasing his house, it had been bought by another person, and his occupation had continued in the same manner, he would have acquired a right to the house as well as to the way. The distinction between unity of seisin and unity of possession, as an answer to a claim of easement, is pointed out in *England v. Wall* (a). [*Martin*, B., referred to the case of *Bright v. Walker* (b).] There the land over which the way was claimed was in the possession of a lessee, who held under a lease for lives granted by the Bishop of Worcester, and the principle of that decision was, that the statute in express terms excludes the time that the person, who is capable of resisting the claim, is tenant for life, and that the period of enjoyment must be against an owner in fee. [*Alderson*, B.—Here there was no enjoyment *as of right* for twenty years. The right was exercised from the time the defendant purchased his house; and the previous time during which he occupied it by permission of the owner of the two houses cannot be taken into account.] It is not necessary that there should be a continuous user against the same party. Neither is the right affected by the change of tenure, for the defendant used the way continuously during the times that he was occupier and owner of his house.

ALDERSON, B.—The rule must be discharged. According to the true construction of the statute, in order to make a user “as of right,” it must be exercised for the period prescribed *as of right against all persons*, so as to be evidence of a perfect right. If such had been the case here, no doubt, under the statute, that would have been equivalent to a grant. But here the defendant has no way “as of right,” since the exercise for the first seven years was during a period when the owner could not stop him; and therefore he gained no right during that

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(a) 10 M. & W. 699.

(b) 1 C. M. & R. 211.

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time, and it must be left out of the computation. In the year 1559 he purchased his house, and for the succeeding fourteen years exercised the right; but he must do so for twenty years; and since the time when he used the way not of right cannot be added to the time when he used it as of right, the user is for less than twenty years. *Bright v. Walker*^a, decided that, if the enjoyment cannot give a title as against all persons having estates in the land, it gives no title as against a lessee and those claiming under him. That seems to me the only sensible construction that can be put on the statute.

PLATT, B.—I am of the same opinion. The statute gives the person who has had the user for the prescribed period the same right as if it had been given him by grant; but the user must have been exercised as of right against the person who could have made the grant. A tenant of the adjoining house could not make the grant, and therefore the user as against him was immaterial.

MARTIN, B.—I am of the same opinion. If the 2nd section of the statute be read with reference to the prior state of the law, the matter is clear. Before the statute, a person who claimed a way by prescription alleged a user as of right from the time of legal memory, and consequently, if it could be established that there was unity of possession *at any time*, that defeated the presumed right. Therefore, whenever there was reason to apprehend that the prescriptive right of way might have been extinguished by unity of possession, it was usual to claim it as a way by non-existing grant; and some Judges left it to the jury to find a grant, while others treated the question as one of law, and directed the jury to presume a grant. Then came the 2 & 3 Will. 4, c. 71, the 2nd section

(a) 1 C. M. & R. 211.

of which provides, that no claim which may be lawfully made at common law, by custom, prescription, or grant, to any way, &c. which shall have been actually enjoyed by any person claiming right thereto, without interruption, for twenty years, shall be defeated by shewing only that such way was first enjoyed at any time prior to such period of twenty years; "*but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated.*" Therefore, by analogy to the prior law, it is evident that the claim may be defeated by shewing a unity of possession within twenty years. The subsequent part of the section shews, beyond all doubt, what was the meaning of the legislature; for it says, that where the way shall have been so enjoyed for the full period of forty years, "the right thereto shall be deemed absolute and indefeasible;" thus drawing a distinction between an enjoyment for twenty years and forty years. Here the right of way is not sought to be defeated by shewing that it was first enjoyed at a period prior to the twenty years, but by shewing a state of things wholly inconsistent with a user as of right. Such a case is clearly not within the statute.

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Rule discharged (a).

(a) *Pollock*, C. B., was absent.

1854.

June 9. THOMPSON *v.* BELL, Public Officer of the National Provincial Bank of England.

The plaintiff kept a deposit account at a joint-stock bank. The manager of the bank represented to him that the bank had an equitable mortgage on some houses of a third person, subject to a mortgage of 400*l.*, and advised him to purchase the houses for 595*l.*, 400*l.* to be paid in discharge of the mortgage, and 195*l.* to the bank. The plaintiff consented, and took his deposit receipts to the manager at the bank, who, on presenting them to a clerk, obtained from him 595*l.* The manager then gave the plaintiff a receipt in his own name, stating, that 195*l.* was the balance of purchase-money of the houses, and that 400*l.* was deposited with him to pay off the mortgage.

He afterwards absconded with the 595*l.* The plaintiff having brought an action against the bank to recover the money, the jury found that the manager intended to make the plaintiff believe, and the plaintiff did believe, that the manager was acting in this transaction as agent for the bank:—*Held*, that the bank was responsible for the money.

COUNT for money lent by the plaintiff to the above company, and for money received by the company for the plaintiff's use.

Pleas, never indebted, and payment; upon which issues were joined.

At the trial, before *Erle*, J., at the last Hampshire Assizes, it appeared that the action was brought to recover from the National Provincial Bank of England the sum of 595*l.*, under the following circumstances:—

Mrs. Thompson, the wife of the plaintiff, who was an engineer, residing abroad, kept a deposit account at the Southampton branch of the National Provincial Bank of England, which was a banking co-partnership under the 7 Geo. 4, c. 46. It appeared that a person who kept a deposit account never drew cheques, but the bank gave him a receipt for the money when deposited, and he might at any time, on presenting that receipt with his name indorsed on it, obtain his principal and interest up to the day of re-payment. In October, 1849, Mrs. Thompson's deposit account consisted of three sums of 744*l.*, 6*l.*, and 25*l.*, for which she held three deposit receipts. At that time one Kerr was the manager of the Southampton branch of the bank; and he represented to Mrs. Thompson that the bank had an equitable mortgage on some houses at Southampton belonging to one Williams, subject to a mortgage of 400*l.*, and advised Mrs. Thompson to purchase the houses for 595*l.*; which she consented to do:

400*l*. to be paid in discharge of the mortgage, and 195*l*. to the bank. On the 12th of November Mrs. Thompson went to the bank with her deposit receipts; and the interest having been calculated up to that time, she indorsed the receipts with her name, and delivered them to Kerr, who presented them to a clerk at the counter of the bank, and received 595*l*. Kerr then gave Mrs. Thompson a new deposit receipt for 180*l*., the balance due to her, and also the following receipt:—

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Southampton, 12th Nov., 1849.

"Received from Mrs. Thompson the sum of One hundred and ninety-five pounds, being the balance of purchase-money of two houses in Frederick Street, Newtown, the property of Mr. William Williams, and occupied by Mrs. Trew and Mr. Pfeil.

"JOHN KERR.

"Purchase-money 595*l*.

"To pay off mortgage 400*l*.

"Balance as above . . . 195*l*—595*l*."

The statement made by Kerr to Mrs. Thompson was untrue, and he absconded with the 595*l*. The defendant adduced evidence to shew that Kerr had no authority from the directors to sell any property of the bank.

It was submitted, on behalf of the defendants, that Kerr, as local manager of the bank, had no authority to enter into a contract of this description, which was not within the scope of the business of a banker, and consequently the defendants were not liable. The learned Judge left it to the jury to say, first, whether Kerr had authority from the bank to assign securities which they held on real property: Secondly, whether Kerr intended to make Mrs. Thompson believe, and Mrs. Thompson did believe, that Kerr was acting as agent for the bank in assigning over the property of the bank. The jury an-

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swered both questions in the affirmative, and a verdict was found for the plaintiff for 595*l*.

Kinglake, Serjt., in last Easter Term, obtained a rule nisi for a new trial on the ground of misdirection; against which,

Bramwell and *Barstow* now shewed cause.—The manager of the bank had authority to enter into the bargain. Assuming that the bank had an equitable mortgage on the property in question for advances made to a customer, then, although the manager might have no power to sell the real property of the bank, it was clearly within the scope of his authority to receive payment of that debt and deliver up the security. An agent, in the absence of notice limiting his authority, must be presumed to have the authority necessary for transacting the business which he is appointed to manage; and it is notoriously part of the business of bankers to lend money on security. This money was given to the manager, upon the faith that he would pay it over to the bank in discharge of a debt due to them, and obtain the security; and, as regards their liability, it can make no difference that his representations were untrue. The case is distinguishable from *Bishop v. The Countess of Jersey* (a); for there the transaction was a mere private arrangement between a customer and one of several partners in a bank for a loan to that partner's son, and consequently the bank could not be liable. Here the transaction was in effect a payment of money into the bank, in order that part of it might be applied in discharge of an equitable mortgage, and the residue handed over to the owner of the houses on the completion of the purchase.

Kinglake, Serjt., and *Montague Smith* in support of the

(a) 2 Drewry, 143.

rule.—The manager could not bind the bank by an agreement to sell their property. In the absence of any special authority, his power to bind them was limited by the authority which the law implies, viz. to do such acts as appertain to the ordinary business of bankers. It is no part of the business of bankers to sell mortgage securities. That the transaction was a private one between the manager of the bank and the plaintiff is evident from the receipt, which is given in his own name. The plaintiff's wife drew out her money from the bank in the usual way by delivering up the deposit receipts, and entrusted it to the manager individually. The case is not distinguishable from *Bishop v. The Countess of Jersey*.

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POLLOCK, C. B.—We all agree that the rule ought to be discharged. The jury have found that the manager of the bank intended to make the plaintiff's wife believe, and that she did believe, that he was acting in this transaction as agent for the bank. That being so, the conclusion is, that the money is still in the bank, since it was paid to the agent of the bank. In my opinion, it is unnecessary to travel further. The manager of a bank is a person appointed to conduct the entire business irrespective of the partners; and in this case the manager undoubtedly received the money in the first instance from the plaintiff's wife, and gave her a deposit receipt. He then represents to her that some benefit would accrue by her investing that money in a different way. She listens to his suggestion, and draws out the money, which she hands over to him, as manager of the bank, to be disposed of in the way suggested. That he does not do, therefore the money is still in the hands of the bank.

ALDERSON, B.—The question resolves itself into one of fact, viz.—was the money paid to the bank, or to the manager individually? Now it appears that the plaintiff's

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wife had a sum of money in the bank on a deposit account, when it was suggested to her by the manager of the bank that she might employ a part of it more profitably by investing it in a particular way. She accedes to that, and is desirous of withdrawing her money as a deposit, and receiving in exchange for it certain houses. For that purpose it was necessary that 400*l.* should be paid in discharge of a mortgage, and that 195*l.* should be paid to the bank, in order to get rid of their equitable lien. Therefore she gives up her deposit notes, and pays to the manager of the bank 595*l.*, in order that he, as such manager, may so dispose of it. But he does not, and therefore the bank are responsible. It is a payment of money into the bank, in order that their agent may dispose of it in a certain way, which he does not do. Then the money is still in the hands of the bank.

PLATT, B., concurred (a).

Rule discharged.

(a) *Martin*, B., was absent.

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WILLIAMS v. THE GREAT WESTERN RAILWAY COMPANY.

June 7.

THE declaration stated, that the company were the owners of the Great Western Railway, and of certain carriages used by them for the conveyance of passengers, goods, and chattels, in, upon, and along the said railway, to wit, from the Paddington terminus to Bristol, and from Bristol to the Paddington terminus, for hire and reward to the company in that behalf; and thereupon the plaintiff, to wit, on &c., became and was a passenger in one of their carriages, to be by them safely and securely carried and conveyed thereby, together with his luggage, on a certain journey, to wit, from the Paddington terminus to Bristol, and thence back again from Bristol to the Paddington terminus, for reward to the company in that behalf; and the company then received the plaintiff as such passenger, together with his luggage, to wit, a portmanteau containing divers goods and chattels of the plaintiff, to wit, two coats, three waistcoats, one pair of trousers, four shirts, six handkerchiefs, one dressing-case, three brushes, one razor, one strop, one pair of boots, one set of studs, two pair of stockings, one bottle of scent, of the value, to wit, of 20*l.*; and thereupon it became and was the duty of the company to use due and proper care that the plaintiff and his luggage should be safely and securely carried and conveyed by and upon the said railway from the Paddington terminus to Bristol, and thence from Bristol back again to the Paddington terminus.—Breach: that the company did not use due and proper care in and about the carriage and conveyance of the plaintiff's luggage, but so carelessly

The 169th section of the 5 & 6 Will. 4, c. cviii., which incorporated the Great Western Railway Company, enacts, "that, without extra charge, it shall be lawful for every passenger travelling upon the railway to take with him articles of clothing, not exceeding forty pounds in weight and four cubic feet in dimensions; and that the company shall in no case be responsible for any things whatsoever carried upon the railway with any passenger, other than such passenger's articles of clothing, not exceeding the weight and dimensions afore-said; Provided that nothing herein contained shall extend to make liable the company further than where, according to law, stage-coach proprietors and common carriers would be lia-

ble." Section 144 enables the company to make bye-laws "for the good government of the affairs of the company, and for the management of the said undertaking." The company made a bye-law, that every first-class passenger should be allowed to carry 112 pounds of luggage free of charge, but that the company would not be responsible for the care of the same, unless booked and the carriage thereof paid for:—*Held*, that the company had no power to make the bye law, since it was in contravention of the 169th section.

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and negligently conducted themselves with respect to the said luggage, that the same thereby became and was wholly lost to the plaintiff.

Plea: That, after the passing of the 5th & 6th Will. 4, c. cvii., and before the times in the declaration mentioned, a bye-law was, in pursuance of and according to the provisions contained in the said Act, made and enacted by the defendants at a general meeting duly convened in that behalf, by which bye-law it was provided and enacted, that every first-class passenger upon the defendants' railway should be allowed to carry 112 pounds, and every second-class passenger 56 pounds, of luggage free of charge; but that the company would not be responsible for the care of the same, unless booked and the carriage thereof paid for accordingly to the company or their officers in that behalf.—Averment, that the said bye-law, from the time when it was made as aforesaid to the time of the committing of the alleged grievances, continually and ever since has been in full force and effect, and reduced into writing under the common seal of the defendants, and printed and published; and that all the requisites to make the same binding and effectual had been, before the time when the plaintiff became a passenger, complied with and fulfilled; and that the said bye-law, ever since the making thereof, up to and at the several times in the declaration mentioned, and every of them, was printed on boards, and hung up and affixed, and continued, on front of the several toll-houses erected on the said railway and the other buildings and places at which any rates or tolls were collected or paid by or to the defendants, and amongst others at the said Paddington Station; that the defendants were always ready and willing to book and receive payments for the luggage in the declaration mentioned; and that the luggage in the declaration mentioned was luggage, and the plaintiff was a first-class passenger within the

true intent and meaning of the said bye-law; and that the plaintiff did not, when he became a passenger, or ever, book and pay for his said luggage, or for any part thereof, and the same was not booked and paid for according to the said bye-law, or in any manner, and the same was not received by the defendants, as in the declaration alleged, otherwise than subject to the said bye-law.

Replication to the said plea, so far as the same relates to part of the said luggage, that is to say, two coats, three waistcoats, one pair of trowsers, four shirts, six handkerchiefs, one pair of boots, two pair of stockings, that the said railway was and is a railway called the Great Western Railway, authorised and constructed under and by virtue of the provisions of certain Acts of Parliament, &c.; that the defendants are the Great Western Railway Company in those Acts mentioned; that, after the passing of the said several Acts, and on the occasion in the declaration mentioned, the plaintiff became and was such passenger in one of their carriages, to be, together with his said luggage, by the company safely and securely carried and conveyed on the said journey upon and along the said railway for reward to the company in that behalf, and the company so then received the plaintiff as such passenger, together with his said luggage, for the purpose aforesaid, and the plaintiff paid the said company, as and for such reward, a sum of money, to wit, 1*l.* 14*s.* 2*d.*; that the said luggage was the said portmanteau, with the said goods and chattels of the plaintiff in the said portmanteau contained; that divers of the said goods and chattels, that is to say, the said two coats, &c., in the introductory part of this replication mentioned, were the plaintiff's requisite and necessary articles of clothing, and were on the said occasion requisite and necessary to be by and with him had and taken upon and along the said railway, and that the said portmanteau was requisite and necessary for holding the said last-mentioned goods and chattels;

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that the residue of the said goods and chattels, that is to say, the said dressing case, the said three brushes, the said razor, the said strop, the said set of studs, and the said bottle of scent, were articles, goods, and chattels of the plaintiff, requisite and necessary for him to be had, taken, and used by him on the said occasion, for the purpose of and in and about the reasonable and necessary attiring and dressing of his person; that the said luggage, that is to say, the said goods and chattels in the declaration mentioned, together with and inclusive of the said portmanteau containing the same, did not exceed forty pounds weight or four cubic feet in dimensions; and that, when he became such passenger on the occasion aforesaid, he had no knowledge or notice of the alleged bye-law; that the said part of the said luggage in the introductory part of this replication mentioned, on the said occasion, by and through the carelessness, negligence, and default of the defendants in that behalf, became and was and is wholly lost to the plaintiff, modo et formâ. And the plaintiff, as to so much of and so far as the said plea relates to the other portion and residue of the said luggage, and the causes of action in respect thereof, says, that he will not further prosecute his suit in respect thereof.



Cowling in support of the demurrer.—The rejoinder and plea are bad. It is material, in the first place, to consider the situation of the company independently of the bye-law. The 5 & 6 Will. 4, c. cvii., not merely empowers the company to construct a railway, which may be used by all persons on payment of toll: sect. 163; but it also authorises the company to become common carriers of passengers and goods: sect. 167(a). The company have availed themselves of that provision, and consequently, by the 169th section(b), every passenger is entitled to have his

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(a) Sect. 167. "That it shall be lawful for the said company, and they are hereby authorised, if they shall think proper, to use and employ locomotive engines or other moving power, and in carriages or waggons drawn or propelled thereby to convey upon the said railway, and also along and upon any other railway communicating therewith, all such passengers, cattle, and other animals, goods, wares, and merchandise, articles, matters, and things, as shall be offered to them for that purpose, and to make such reasonable charges for such conveyance as they may from time to time determine upon, in addition to the several rates or tolls by this Act authorised to be taken: Provided always, that it shall not be lawful for the said company, or for any person using the said railway as carriers, to charge for the conveyance of any passenger upon the said railway any greater sum than the sum of three-pence halfpenny per mile, including the toll or rate hereinbefore granted."

(b) Sect. 169. "That without extra charge it shall be lawful for every passenger travelling upon or along the said railway to take with him his articles of clothing not exceeding forty pounds in weight and four cubic feet in dimensions; and the said company shall in no case be in any way liable or responsible for the safe carriage or custody of, or for any loss of or injury to any articles, matters, or things whatsoever carried upon or along the said railway, with or accompanying the person, of or belonging to any passenger, or delivered for the purpose of being carried, other than and except such passenger's articles of clothing, not exceeding the weight and dimensions aforesaid: Provided always, that nothing herein contained shall in any case extend or be deemed or construed to extend to charge or make liable the said company further or in any other case than where, according to the laws of this realm for the time being, stage coach proprietors and common carriers would be liable;

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clothing, not exceeding forty pounds in weight, and four cubic feet in dimensions, carried without extra charge. To that extent the company are subject to all the liabilities of common carriers, but not beyond that limit, unless they agree to become so for an additional consideration. But, if a passenger carried articles of clothing not exceeding the prescribed weight and dimensions, the company would be responsible for their loss, although he carried something in addition. Therefore, independently of the bye-law, the plaintiff would clearly be entitled to recover. Then, what is the effect of the bye-law? It cannot be read literally; for, if so, it would apply to articles of clothing under forty pounds weight, and so conflict with the express provisions of the 169th section. It must, therefore, be read in connection with the 167th and 169th sections, and its meaning will then be, that, in addition to the forty pounds weight of clothing, every first class passenger may carry, free of charge, luggage of any description, making up the weight of 112 pounds; but that the company will not be responsible for the excess above forty pounds, unless booked and the carriage paid for. In any other view the bye law is bad, for it in effect repeals the 169th section. But, further, the company had no power to make this bye-law. The 144th section (a) empowers the

nor shall anything herein contained extend or be deemed or construed to extend in any degree to deprive the said company of any protection or privilege which either now or at any time hereafter common carriers or stage coach proprietors have or may have; but the said company shall from time to time and at all times have and be entitled to the benefit of every such protection and privilege."

(a) Sect. 144. "That the said

company, at some general or special general meeting of the said company, shall have full power and authority from time to time to make such bye-laws, orders, and rules as to them shall seem expedient for the good government of the affairs of the said company, and for regulating the proceedings and remunerating and reimbursing the expenses of the said directors, and for the management of the said undertaking, and of the officers and ser-

company to make bye-laws "for the good government of the affairs of the said company, and for regulating the proceedings, and remunerating and reimbursing the expenses of the said directors, and for the management of the said undertaking, and of the officers and servants of the said company," &c.; "and to impose and inflict such reasonable fines and forfeitures upon all persons offending against the same, as to the same company shall seem meet, not exceeding the sum of 5*l.* for any one offence." This bye-law is unauthorised by that section, and unreasonable. [*Pollock, C. B.*—If the company have power to make such a bye-law, they may impose a penalty of 5*l.* upon every passenger who disobeys it. The 144th section certainly does not authorise such a bye-law.]

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vants of the said company, in all respects whatsoever, and from time to time to alter or repeal such bye-laws, orders, and rules, or any of them, and to make others, and to impose and inflict such reasonable fines and forfeitures upon all persons offending against the same as to the said company shall seem meet, not exceeding the sum of five pounds for any one offence, such fines and forfeitures to be levied and recovered as any penalty may by this Act be levied and recovered; which said bye-laws, orders, and rules, being reduced into writing under the common seal of the said company, shall be printed and published; and such bye-laws, orders, and rules, except such as shall relate solely to the proprietors or directors of the said company, or to any of their officers or servants, shall be painted on boards, and hung up and affixed and continued on

the front or other conspicuous part of the several toll-houses to be erected on the said railway and other buildings or places at which any rates or tolls shall be collected or paid under the authority of this Act; and which boards shall from time to time be renewed as often as the same or any part thereof shall be obliterated or destroyed; and such bye-laws, orders, and rules shall be binding upon and be observed by all parties, and shall be sufficient in all Courts of law or equity to justify all persons who shall act under the same: Provided that such bye-laws, orders, or rules be not repugnant to the laws of that part of the United Kingdom of Great Britain and Ireland called England, or to any directions in this Act contained; and all such bye-laws, orders, and rules shall be subject to appeal in manner hereinafter mentioned."

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The Court then called on

Willes for the defendants.—The bye-law is not unreasonable, at least with reference to booking the luggage. It is in accordance with the exceptions engrafted on the common-law liability of carriers: *Baxendale v. Hart*(a). By the 169th section, the company are not responsible for luggage other than a particular description, unless an extra charge is paid. By the bye-law the company do not refuse to carry without extra charge; but they only require, that passengers who seek to impose on them an additional risk, should comply with its requisitions. [*Alderson*, B.—The 169th section says, that without extra charge the company shall be liable, as common carriers, for articles of clothing of certain weight and dimensions; the bye-law says, that the company will not be liable for those articles unless booked and paid for.] It is conceded that, unless the bye-law is one which it was competent for the company to make under the 144th section, in connection with the 169th, the plea is bad. The words in the 144th section “for the management of the said undertaking” are sufficiently large to include the “management of the traffic on the railway.” The 189th section(b) enables the

(a) 6 Exch. 782.

(b) Sect. 189. “That it shall be lawful for the said company from time to time to make such orders and regulations as they shall think proper for regulating the travelling upon and use of the said railway, and the times when the same shall be open for use, and for or relating to travellers and carriages passing upon the said railway, and for or relating to the mode or means by which and the speed at which such carriages shall from time

to time be moved or propelled, and the times of their departure and arrival, and the loading or unloading thereof respectively, and the weights which they shall respectively carry, and the delivery of goods and other things which shall be conveyed in or upon such carriages, and also for preventing the smoking of tobacco and the commission of any other nuisance in or upon any such carriages, or in any of the stations or premises occupied by or belonging to the said

company to make orders for regulating the travelling upon and use of the railway. Suppose the company made an order that a direction should be put on all luggage, and a passenger refused to obey the order, might not the company refuse to carry his luggage? If so, it is clear that they have a power with respect to carrying luggage independently of the 169th section.

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POLLOCK, C. B.—The bye-law is clearly bad: it contravenes the 169th section.

ALDERSON, B.—I am of the same opinion. The bye-law in effect repeals that section.

PLATT, B.—I am of the same opinion. The company have as much right to make a bye-law that they will not be responsible for the safety of passengers.

MARTIN, B.—The company have certainly no power to make such a bye-law.

Judgment for the plaintiff(a).

company, and generally for regulating the passing upon, using, or working the said railway and other works by this Act authorised, or in anywise relating thereto respectively; and all such orders and regulations shall be binding upon and be conformed to by the said company, and by all owners of and persons having the care or conduct of such carriages, and by all persons using or working the said railway and other works, and by all travellers and passengers passing upon the said railway, upon pain of forfeiting and paying a sum not exceeding 5*l.*, which the said company may

attach to any such default: Provided always, that in every case of infraction or non-observance of any such rules or regulations, which shall be attended with danger to the public or annoyance to travellers, or which shall obstruct or hinder the said company in their due and lawful use and working of the said railway, it shall be lawful for the said company and their agents summarily to interfere to obviate such danger, or to remove or prevent such obstruction, nuisance, or hindrance."

(a) See *Great Western Railway Company v. Goodman*, 12 C. B. 313.

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May 31.

HOOKPAYTON v. BUSSELL.

No action will lie upon an undertaking contained in a Judge's order, though the order be made by consent, and the undertaking be founded upon a good consideration.

THE declaration stated that, before the making of the Judge's order thereafter mentioned, the plaintiff recovered against the defendant in the Court of Exchequer a judgment for 147*l.* 8*s.*; that the defendant afterwards filed his petition in the Court for the Relief of Insolvent Debtors for protection from process, and thereupon the granting of such protection was opposed by the plaintiff, and the same was adjourned sine die, and the plaintiff incurred in such opposition costs amounting to 4*l.* 4*s.* 0*d.*; that the plaintiff afterwards issued on the said judgment a writ of ca. sa. indorsed to levy 149*l.* 4*s.* 8*d.* and interest, by virtue whereof the sheriff took the defendant in execution. "And thereupon, and whilst the defendant was so in custody by virtue of the said writ, the defendant caused a summons to be issued out of the Court of Exchequer, and to be served on the plaintiff, to shew cause why, amongst other things, the defendant should not be discharged out of the custody of the said sheriff; which summons was afterwards, on the 27th day of April, A D. 1852, attended by the plaintiff and the defendant before Sir T. J. Platt, one of the Barons of the Court of Exchequer; and in consideration that the plaintiff would not oppose, and would consent to the said Sir T. J. Platt making the order hereinafter mentioned, and the defendant being discharged out of custody, the defendant consented to the said Sir T. J. Platt making the order hereinafter mentioned; and thereupon, on the same day and year, the said Sir T. J. Platt, by and with the consent of the plaintiff and the defendant, made an order in the words and figures following, (that is to sa) — *William Hookpayton v. Edward Bussell*: Upon hearing the attornies or agents on both sides, I do order that, upon payment by the defendant of 5*l.* to the plaintiff's attorney forthwith, the defendant be discharged out of the

custody of the sheriff of Middlesex as to this action, the defendant hereby undertaking to pay the rest of the debt and costs, including the costs of the opposition (4*l.* 4*s.* 0*d.*) in the Insolvent Court by monthly instalments of 2*l.* The first payment to be made on the 27th day of May next, the judgment to stand as a security. The defendant hereby consenting, that, in default of payment in either of the said instalments as aforesaid, the plaintiff be at liberty to issue execution by fieri facias or capias ad satisfaciendum: the defendant hereby undertaking to bring no action against the plaintiff. Dated this 27th day of April, 1852. T. J. PLATT.—Averments, that the defendant thereupon then forthwith paid to the plaintiff's attorney, in pursuance of the said order, the sum of 5*l.*, and with the consent of the plaintiff was discharged out of the custody of the sheriff as to the said action; and although the defendant afterwards, in pursuance of his said undertaking, did pay to the plaintiff the first of the said instalments of 2*l.*, yet he has not paid any other of the said instalments.

Demurrer and joinder.

Maude in support of the demurrer.—The declaration does not disclose any cause of action. It will be argued that this is not the ordinary case of a Judge's order, because the circumstances under which it was made create a contract on the part of the defendant to obey it. But the order is a mere direction by the Judge that certain things shall be done, and for the disobedience of which the defendant is liable to an attachment. The case is not distinguishable in principle from *Dent v. Basham* (a), where this Court held that no action lies for the disobedience of a Judge's order made under the 6 & 7 Vict. c. 73, s. 37, for the delivery by an attorney to his client of his bill of costs. Though the order in question was made by consent, it must be treated as any other order: *Joddrel v. —* (b).

(a) 9 Exch. 469.

(b) 4 Taunt. 253.

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The Court then called on

Dowdeswell to support the declaration.—On the face of the declaration, there is a mutual agreement between the parties, founded on a good consideration, and ratified and confirmed by a Judge's order. It is not the less a contract between the parties because its performance may be enforced by attachment. [*Platt*, B.—There is no instance of an action on a peremptory undertaking. *Pollock*, C. B.—A Judge's order is an undertaking, not to the party, but to the Court. *Martin*, B., referred to *Wade v. Simeon* (a).] In *Wentworth v. Bullen* (b), *Parke*, J., says, "Now, though there is no remedy for disobedience of a Judge's order (as such) by one of the parties against another by action, but by attachment merely, yet, if it be made by the consent of both, and be founded on a binding agreement, an action will not the less lie upon that agreement, though it have also the additional sanction of a Judge's order. The contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a Judge. The case of an agreement to refer by order of a Judge is a familiar instance, many actions being brought on such agreements." [*Pollock*, C. B.—Those observations were purely obiter dicta. The action was brought for arresting the plaintiff for too much; and, a verdict having been found for the plaintiff, a rule nisi was obtained for entering a nonsuit, on the ground that the action was not maintainable, or for a new trial, on the ground that the damages were excessive. All the Judges were of opinion that the damages were excessive, and on that ground granted a new trial; and, my Brother *Parke* having intimated a doubt whether the action was maintainable, the Court recommended the parties to come to some arrangement.] The fact of the plaintiff

(a) 2 C. B. 548.

(b) 9 B. & C. 840.

having a remedy by attachment does not prevent him from bringing an action for the breach of contract.

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POLLOCK, C. B.—The defendant is entitled to judgment. Where the order is made by authority of the Judge, and without the consent of the parties, I am clearly of opinion that no action will lie upon it. Then does it make any difference that the order is made by consent? I think not. The consent is merely the giving a power to make an order which could not be made without it, but when the order is made, it is the same as an order in invitum, and the proper remedy for disobedience of it is by attachment. We ought to guard against attempts to create new causes of action, and new modes of multiplying costs.

ALDERSON, B.—I am of the same opinion. This is in substance an action on an order of a Judge. It is said that, because the order is made by consent, it amounts to a contract. But the consent is only a permission for the Judge to make the order, which he could not otherwise do. Then, the consent having given the Judge jurisdiction, it is the same as if he had jurisdiction before, and the order is an undertaking to the Court that the party will do what he is ordered, and if he does not he is subject to an attachment. I do not agree with the observations of my Brother *Parke* in *Wentworth v. Bullen*.

PLATT, B.—The compact between the parties is, that an order of a Judge shall be drawn up upon those terms, and that the party shall have the remedy for enforcing it which is incident to a Judge's order, viz. attachment.

MARTIN, B.—I am of the same opinion. No action can be maintained on a Judge's order, as such. It is urged that this, being an order made by consent, amounts to a contract. But the order is not drawn up on consent, and if there

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has been any contract to pay the money, the plaintiff should declare upon it, and not upon the order. It is obvious what the nature of the order is. The defendant, being in custody, applies to a Judge to be discharged, and it is arranged that he shall be discharged upon payment of a sum of money down, and the rest by instalments, the judgment to stand as a security, and the defendant consenting that, in default of payment of any instalment, the plaintiff shall be at liberty to issue execution. The latter stipulation shews that it was never intended that the Judge's order should be a contract. If the argument on behalf of the plaintiff is correct, an action would lie for the disobedience of every Judge's order in which a party undertakes to do some act.

Judgment for the defendant.

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JONES v. NICHOLSON and Another.

Barratry can be committed by a master who is also part owner of the ship.

THIS action came on for trial before *Wightman, J.*, at the Liverpool Summer Assizes, 1853, when a verdict was found for the plaintiff for the damages in the declaration, subject to the following case:—

The declaration stated, that the defendants, on the 15th October, 1849, caused to be made a policy of insurance, at and from Monte Video to Valparaiso, upon any kind of goods, &c., of and in a vessel called the *Helena*, which were and should be valued at, on a cargo of lumber, value 2000*l.*, warranted free from particular average, unless stranded. That the plaintiff became an insurer to the defendants under the said policy of 100*l.* upon the said cargo in the said policy mentioned, and duly subscribed the said policy, the defendants having duly paid

the consideration for that assurance. That, on the 5th of April, 1850, the defendants gave notice to the plaintiff, that divers quantities of lumber, namely, a cargo thereof of great value, had been shipped and loaded at Monte Video on board the said ship, to be conveyed therein on the said voyage; and that the defendants were then, and from thence until the supposed loss thereafter mentioned, interested in the said cargo; and that the said ship and cargo had not arrived at Valparaiso, and had not been heard of; and that the defendants requested the plaintiff to pay them the said sum insured by him as for a total loss. That thereupon, in consideration that the plaintiff would sign off and pay to the defendants as for a total loss on the said policy, on the understanding that, in case the said ship should be heard of thereafter, the plaintiff should be put on the same footing as if that payment had not been made, the defendants promised that, in case the said ship should be heard of thereafter, the plaintiff should be put on the same footing as if that payment had not been made. That the plaintiff afterwards signed off and paid as for a total loss on the said understanding 80*l.*, 20*l.* residue of the said 100*l.* being deducted by reason of short interest of the defendants in the cargo, such deduction being then agreed to and allowed. That the ship and cargo were not, nor was any part of either of them, lost or damaged by the perils of the seas; and the vessel was afterwards heard of, of which the defendants had notice, and were requested to put the plaintiff on the same footing as if that payment had not been made. That, nevertheless, the defendants had not put the plaintiff on the same footing, &c., and that the 80*l.* remained unpaid.

The defendants pleaded (*inter alia*), that, after making the said policy, and during the continuance of the risk thereby insured against, and whilst the vessel was on her voyage, the vessel and cargo were, by the perils which in

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and by the policy the plaintiff took upon himself, to wit, by barratry of the master and mariners, wholly lost to the defendants, and never arrived at Valparaiso.—Upon which issue was joined.

The plaintiff is an underwriter at Liverpool. The defendants are merchants carrying on business at Liverpool under the firm of Joseph Green & Co., and at Monte Video under that of Nicholson, Green, & Co. On the 15th of October, 1849, the defendants effected the policy mentioned in the declaration. The policy contained the following clause:—“Touching the adventures and perils which we the assurers are contented to bear and do take upon us on this voyage, they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise, and ship, &c., or any part thereof.”

On the 23rd of July, 1849, an agreement for charter was made at Monte Video, between David Palmer Moffatt, who was then in possession of the vessel and master thereof, and who is therein described as owner and master thereof, and the defendants’ firm of Nicholson, Green, & Co., for a voyage to Valparaiso(a). The goods insured

(a) There was annexed to the case a copy of the charterparty, which contained the following stipulations:—“That the ship, being tight, staunch, &c., shall, receive from the said merchants a full and complete cargo of merchandise, not exceeding what she can reasonably stow and carry, &c., and shall receive all goods that they may send on board, but no goods whatever to be taken on board without an order from the charterers, it being understood that the hold of the vessel is in all such parts or places capable of holding cargo from the cabin to the bulk head. The vessel, having received her cargo in this port, shall proceed

were subsequently shipped by the defendants at Monte Video for Valparaiso, in pursuance of the said agreement for charter; and, on the 20th August, 1849, the Helena, with the said goods, sailed from Monte Video under the command of the said D. P. Moffatt.

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In April, 1850, the defendants applied to the plaintiff and the other underwriters for payment as for a total loss upon the said policy, upon the ground that the vessel had not been heard of as having arrived at Valparaiso; and, thereupon, the underwriters respectively, on the 5th of April, 1850, agreed to pay the defendants a total loss, upon the terms stated in a memorandum indorsed on the said policy, as follows: "agreed to sign off a total loss on this policy, on the understanding, that, in case the vessel should be heard of hereafter, the underwriters are to be put upon the same footing as if this payment had not been made." And accordingly, on the 13th of May, 1850, the plaintiff paid to the defendants the sum of 80*l*., being the amount of his subscription after deducting 20*l*. for short interest, the defendants' interest being declared to be 1600*l*.

The Helena was built at Sydney, Cape Breton, by the said D. P. Moffatt and George Moffatt, and was registered on the 6th of August, 1847, in the names of the said D. P. Moffatt as owner of 34/64ths, and G. Moffatt as owner of 30/64ths of the vessel. D. P. Moffatt and G. Moffatt, on the 3rd of September, 1847, mortgaged the vessel in conformity with the statute 8 & 9 Vict. c. 89, s. 45, to W. Gamnill, of Little Brasdor, Cape Breton, merchant, to secure 640*l*. and interest; but the mortgagee did not take possession of the vessel.

to the port of Valparaiso, or so near thereunto as she may safely get, and deliver the same in conformity with bills of lading. The charterers agree to pay for the

hire of the said vessel for the above voyage the sum of 1200 silver dollars, in full, to be paid on the right delivery of the cargo."

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After leaving Monte Video, as before mentioned, D. P. Moffatt, without the consent either of the defendants, or of the said G. Moffatt, or of the said W. Gammill, proceeded direct to the Cape of Good Hope instead of Valparaiso, and on arrival at the Cape of Good Hope landed the goods of the defendants in good order; and there, previously to the 5th of April, 1850, and fraudulently against the defendants and all others interested, and for his own purposes, sold the goods; and there also fraudulently against the mortgagee, and for his own purposes, sold the vessel, and applied the proceeds of both ship and cargo to his own use. In the summer of 1851 it came to the knowledge of the defendants at Monte Video, by information from one of the crew of the said vessel, that D. P. Moffatt had fraudulently sold the vessel and cargo as above mentioned, and that the vessel had sailed from the Cape of Good Hope under another charge for London; and they immediately informed the underwriters. The latter thereupon caused an application to be made to the defendants for repayment of the 1600*l*. The defendants denied their liability, and refused to repay the same.

The question for the opinion of the Court is, whether there was a loss by barratry or otherwise, within the policy. If there was no such loss, the verdict is to be entered for the plaintiff for 80*l*. and interest; if there was such loss, a nonsuit is to be entered.

Cowling (*Atherton* with him) for the plaintiff.—There has been no loss by barratry or any other perils within the meaning of the policy. Although the conduct of the master was fraudulent, yet he could not commit barratry, by reason of his being part owner of the vessel. Barratry means some fraudulent act committed by the master or mariners *as such*, against the owners of the vessel: *Vallejo v. Wheeler* (a). Lord *Mansfield*, C. J., in delivering the

(a) 1 Cowp. 143; Loft, 631.

judgment of the Court in *Nutt v. Bourdieu* (a), says, "The point to be considered is, whether barratry, in the sense in which it is used in our policies of insurance, can be committed against any but the owners of the ship. It is clear beyond contradiction that it cannot; for barratry is something contrary to the duty of the *master and mariners*, the very terms of which imply that it must be in the relation in which they stand to the *owners of the ship*. The words used are *master and mariners*, which are very particular. An owner cannot commit barratry. He may make himself liable for his fraudulent conduct to the owner of the goods, but not as for barratry. And, besides, barratry cannot be committed against the owner *with his consent*. For, though the owner may become liable for a civil loss by the misbehaviour of the captain if he consent, yet that is not barratry. Barratry must partake of something criminal, and must be committed *against the owner* by the *master or mariners*." In Arnould on Insurance, Vol. 2, p. 832, the author, after adverting to the doctrine that no act can be barratrous which is authorised or sanctioned by the owners of ships, says, "Upon the same principle, it is clear that barratry cannot be committed by a master who is owner or part owner of the vessel." Again, in Phillips on Insurance, Vol. 1, p. 612, s. 1082, it is said, "Barratry being an act prejudicial to the owners, and done without their consent, it is plain that it cannot be committed by a master who is owner or part owner of the vessel" (b). [Alderson, B.—Offences by

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(a) 1 T. R. 323.

(b) No authority is cited for the position laid down in Arnould on Insurance. In Phillips on Insurance, the authority referred to is *Marcadier v. The Chesapeake Insurance Company*, 5 Cranch, 39, a decision of the Supreme Court of the United

States in 1814. The point there decided was, that, where the general owner of a ship retains the possession, command, and navigation of the same, and contracts to carry a cargo on freight for the voyage, the charter-party is to be considered as a mere affreightment sounding in

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master and mariners, which fall within the definition of barratry, and are punishable under the 7 Will. 4 & 1 Vict. c. 89, s. 6, would clearly include those committed

covenant, and the freighter is not clothed with the character or legal responsibility of ownership. In such case the general owner is also owner for the voyage; consequently, if he be the master of the vessel, he is incapable of committing barratry. The judgment of the Court, which was delivered by *Story, J.*, is as follows:—"The next question is, whether there was a total loss by the barratry of the master? And this depends exclusively upon the consideration who was owner of the brig for the voyage; for it is conceded on all sides, that the conduct of the master was barratrous, if he was in a situation to commit that offence. Barratry is an act committed by the master or mariners of a ship for some unlawful or fraudulent purpose, contrary to their duty to their owners, whereby the latter sustain an injury. It follows, therefore, from the very terms of the definition, that it cannot be committed by a master who is owner for the voyage, because he cannot commit a fraud against himself. But it may be committed against a person who is owner for the voyage, although he may not be the general owner of the ship. A person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession,

command, and navigation of the ship. Such is understood to have been the case: *Vallejo v. Wheeler*, Cowp. 143. But, where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charterparty is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. Such was the case of *Hove & Co. v. Groverman*, in this Court, 1 Cr. 214. In the first case, the general freighter is responsible for the conduct of the master and mariners during the voyage; in the latter case, the responsibility rests on the general owner. On examining the charterparty in the present case, there can be no doubt, from the terms and stipulations, that it falls within the latter class of cases. The master, who was the general owner, retained the exclusive possession, command, and management of the vessel, and she was navigated at his expense during the voyage. The whole charterparty, except the introductory clause, sounds merely in covenant. The ownership was not divested by the covenant of affreightment, and consequently the master was incapable of committing barratry."

by part owners. In the case of *Easterby v. M'Farlane*(a), two owners of a vessel were convicted of a barratrous act under the 11 Geo. 1, c. 29, ss. 6, 7. In *Abbott on Shipping*, p. 184, 6th edit., it is said, "It would seem, that one part owner, being master, may commit barratry against another."] The authorities there cited do not support that position. One is a manuscript note of a case of *Boutflower v. Wilmer*, before *Lee*, C. J., at the London Sittings after Trinity Term, 21 Geo. 2, which is thus quoted in 2 Selw. N. P. 962, 10th edit.: "So, where the insurance is made by and in favour of the ship-owner, and the barratrous act is committed with the privity of the freighter, the underwriter is not discharged, unless he can shew that the ship-owner also was privy to the barratry." The other authority cited in *Abbott on Shipping* is the following passage in *Bell's Principles of the Law of Scotland*, p. 188: "A difficulty has been raised as to barratry by a master, himself a *part-owner* only. But it would seem, that no exception could be taken against the claim of the other part owners not participant in or consenting to the act, more than to the claim of a freighter on the barratry of the owner, or of the owner on barratry with consent of the freighter." In support of that proposition, the manuscript case of *Boutflower v. Wilmer* is referred to. [*Alderson*, B.—The reason why a sole owner cannot commit barratry is, that he has a perfect right, so far as his interest is concerned, to do the act; and no person can be said to do *fraudulently* that which he has a right to do. But a part owner can have no right to sell the ship as against the other part owners; and, if so, the sale is an act fraudulently done as against them, and is the same in principle as if done by the master, not being owner. The 7 Will. 4 & 1 Vict. c. 89, s. 6, says, that whosoever shall destroy a ship, "with intent thereby to prejudice any owner or part

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(a) East, P. C., Addenda, p. 27.

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owner of such ship," shall be guilty of felony. Then, if one part owner does an act which he has no right to do, and does it fraudulently, that is a prejudice to the other part owners.]—On this point he then argued, that the master did not cease to be owner by reason of his having mortgaged the vessel, citing *Lewis v. Swazo* (a), and the 8 & 9 Vict. c. 89, s. 45: also, that the effect of the charter-party was not to render the freighters owners of the vessel, citing *M'Intyre v. Borne* (b), *Marcardier v. The Chesapeake Insurance Company* (c), *Vallezjo v. Wheeler* (d), *Soares v. Thornton* (e).—He further argued, that this was not a loss within the general words of the policy, "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods," &c. On this point he cited Phillips on Insurance, Vol. 2, p. 306, s. 1574; Id. Vol. 1, p. 626, s. 1099; *Cullen v. Butler* (f).

J. Wilde for the defendant.—Barratry may be committed by a master who is part owner. The question depends on this, whether the master has been guilty of a malversation in his office. Where the master is sole owner, he cannot commit barratry, neither can it be committed against him with his consent; because, in the former case, he cannot commit a fraud against himself, and, in the latter, it cannot be said that the master has broken his trust to the owner, when he has consented to the act. To constitute barratry, there must be something of a criminal nature as well as a breach of contract, *Stamma v. Brown* (g), and that may be committed by one part owner against another. *Willes, J.*, in *Lockyer v. Offley* (h), defines barratry as

(a) Postlethwayt's Dict. art. "Assurance," p. 147.

(b) 1 Johns, 229.

(c) 8 Cranch, 30; ante, p. 33, n.

(d) Cowp. 143; Lofft, 631.

(e) 7 Taunt. 627.

(f) 5 M. & Selw. 461.

(g) 2 Str. 1773.

(h) 1 T. R. 259.

"every species of fraud or knavery in the master, by which the freighters or owners are injured." Then are the other owners the less injured, because the master happens to be a part owner? There is equally a fraudulent act in violation of his duty as master to the other owners.—[He was then stopped by the Court.]

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POLLOCK, C. B.—We all agree that the plaintiffs are not entitled to recover. The question is precisely the same as if, instead of the underwriters seeking to get back the money paid to the assured, the latter had sought to recover for their loss against the underwriters; and the point which we have to decide is, whether barratry can be committed by a master, who is also part owner of the vessel. I am of opinion that it can. Some expressions of modern authors to the contrary have been cited; but they are, in truth, no authority whatever, since the doctrine laid down is not supported by any decided case. A master who is sole owner cannot commit barratry, because he cannot commit a fraud against himself, but there is no reason why the fact of a master being part owner should prevent the other part owners from insuring their interest in the ship, or the freighters from insuring their goods. If a master, being part owner, in fraud of the other owners, makes away with the ship, that in my opinion is barratry. The whole principle on which the doctrine rests supports that view. I forbear to express any opinion on the other points raised: it is sufficient to say that there has been a loss by barratry, which would have entitled the assured to recover from the underwriters, and consequently they cannot recover in this action.

ALDERSON, B.—I am of the same opinion. Barratry is a fraud committed by the master or mariners against the owners of the vessel. Though committed by the master and one of several owners, that would not make it the

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less a fraud on the part of the master. Then, if the master, being himself a part owner, commits the barratry, that is equally a fraud upon the other part owners. Whenever it is a fraudulent act on the part of the master, it is barratry; but it cannot be a fraudulent act when he is sole owner.

PLATT, B.—I am of the same opinion. Because the master happens to be a part owner, how can it be said that the barratry committed by him is not a fraud against the other owners, who have separate shares in the vessel?

MARTIN, B.—I am of the same opinion. If the master in fraud of the owners makes away with the ship, that is barratry. And why is it? It is not simply because the master has done the act, but because the act makes the owners responsible to the charterers for a breach of contract. So here, in consequence of the act of David Moffatt, George Moffatt is responsible, in the same manner as if he had been sole owner of the vessel. But, even if this loss did not come within the strict definition of barratry, I should be disposed to think that it was a loss by "perils" within the meaning of the policy. *Oullen v. Butler* is an



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THE first count of the declaration stated, that the defendants broke, bored, and cut into certain gas main pipes and other pipes of the plaintiffs, and affixed and fastened gas pipes of the defendants and other pipes thereto, and kept and continued the said gas pipes of the defendants, and the said other pipes, so affixed and fastened thereto for a long time; by means whereof large quantities of gas of and belonging to the plaintiffs were allowed to escape and flow, and did escape and flow, from and out of the said gas main pipes and other pipes of the plaintiffs, and were wholly lost to the plaintiffs.—Second count: That the defendants, having so broke, bored, and cut into the said gas main pipes and other pipes of the plaintiffs, and so affixed and fastened gas pipes of the defendants and other pipes thereto, and so kept and continued the said gas pipes of the defendants and other pipes so affixed and fastened thereto for a long time, without the knowledge of the plaintiffs, by means whereof large quantities of gas of and belonging to the plaintiffs have been allowed to escape and flow, and had escaped and flowed, from and out of the said gas main pipes and other pipes of the plaintiffs, and were wholly lost to the plaintiffs, without the knowledge of the plaintiffs, they the defendants, wrongfully, subtilely, and maliciously intending and contriving to hinder and prevent the plaintiffs from discover-

It is no answer to a plea of the Statute of Limitations, that the plaintiff was prevented by the fraud of the defendant from knowing of the cause of action until after the time of limitation had expired.

A count stated, that the defendants bored into certain gas pipes of the plaintiffs, and affixed gas pipes of the defendants thereto, and kept them so affixed for a long time, without the knowledge of the plaintiffs, by means whereof large quantities of the plaintiffs' gas flowed out of their pipes; that the defendants, maliciously contriving to prevent the plaintiffs from discovering the trespasses so committed till six years should have elapsed,

fraudulently, and without the plaintiffs' knowledge, cut off from the plaintiffs' gas pipes, the gas pipes of the defendants so affixed thereto, and fraudulently, and without the plaintiffs' knowledge, stopped and plugged up the gas pipes of the plaintiffs where the gas pipes of the defendants had been so affixed: by means whereof the plaintiffs were prevented from discovering the trespasses until six years from their commission had elapsed, and thereby the remedy of the plaintiffs by action became barred.—*Held*, that the count disclosed a good cause of action.

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ing the trespasses so committed by the defendants till a period of six years from the commission of such trespasses respectively should have elapsed, did secretly, covinously, and fraudulently, and without notice to the plaintiffs, and without their knowledge, cut off and sever from the said gas main pipes and other pipes of the plaintiffs, divers of the said gas pipes of the defendants, and other pipes so by the defendants affixed and fastened thereto as aforesaid, and secretly, covinously, and fraudulently, and without notice to the plaintiffs, and without their knowledge, stopped and plugged up with divers substances the gas main pipes and other pipes of the plaintiffs, where the said gas pipes of the defendants and other pipes had been so affixed and fastened thereto by the defendants, and secretly, covinously, and fraudulently, and without notice to the plaintiffs, and without their knowledge, kept and continued the same so plugged and stopped up for a long time; by means whereof the defendants hindered and prevented the plaintiffs from discovering the trespasses so by the defendants committed, as in the commencement of this count mentioned, till a period of six years from the commission of each of such last-mentioned trespasses had elapsed, and thereby the remedy of the plaintiffs by action against the defendants for the last-mentioned trespasses became and was barred by the Statute of Limitations, and the plaintiffs became and were hindered and prevented from effectually maintaining against the defendants any action or actions in that behalf.—Third count: That the defendants converted to their own use gas of the plaintiffs.—There were also counts for money payable for gas supplied by the plaintiffs to the defendants, and for money received by the defendants for the use of the plaintiffs.

Plea, (to all but the second count), that the alleged causes of action did not, nor did any or either of them, accrue within six years before this suit.

Demurrer to second count, and joinder therein.

Replication to plea to first and third counts.—That the causes of action in those counts mentioned accrued and arose by and through the secret, covinous, and fraudulent acts of the defendants in secretly, covinously, and fraudulently breaking, boring, and cutting into certain gas main pipes and other pipes of the plaintiffs, and secretly, covinously, and fraudulently affixing and fastening, and keeping and continuing affixed and fastened, gas pipes of the defendants and other pipes thereto as in the first count alleged, and in secretly, covinously, and fraudulently converting to the defendants' own use gas of the plaintiffs, as in the third count mentioned, by and through such gas pipes of the defendants, and such other pipes by them affixed and fastened to the said main pipes and other pipes of the plaintiffs. That the defendants, for a long time after the committing of the said secret, covinous, and fraudulent acts, and continually until a time within six years next before the commencement of this suit, actively endeavoured covinously and fraudulently to hide and conceal, and did thereby covinously and fraudulently hide and conceal, from the plaintiffs the said several secret, covinous, and fraudulent acts and each of them, and the plaintiffs, during all that time and continually until a time within six years next before the commencement of this suit, by and through the covin and fraud of and practised by the defendants, were prevented from discovering or knowing, and did not discover or know, of the existence of the said causes of action in the first and third counts mentioned, or any of them. And the plaintiffs first discovered and knew of the last-mentioned several causes of action, and each of them, within six years next before the commencement of this suit.—There was a similar replication to the plea to the money counts.

Demurrers, and joinder therein.

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Bovill for the defendants.—The question raised by the demurrers to the replications is, whether, in a Court of law, the operation of the Statute of Limitations can be defeated by a fraudulent concealment of the cause of action. It is submitted that it cannot. There are various dicta on the subject, but no express authority in point. *Blair v. Bromley* (a) decided that, in equity, the limitation does not begin to run until after the fraud is discovered. There Sir *J. Wigram*, V. C., says, “In order that my decision in this case might be placed on as broad a basis as possible, I have endeavoured to inform myself how the case would stand at law, if the plaintiffs had brought the action at law against the defendant, founded only on the receipt of the money. It is admitted, that the Statute of Limitations would have been an answer to the demand. I have endeavoured to inform myself whether there was any form of action by which the plaintiffs’ proceedings at law might have avoided the Statute of Limitations; and I believe I am correct when I say, there is no proceeding at law by which they could have avoided the effect of the statute;—no proceeding founded solely on any distinction arising out of the fraud. The consequence is, that the plaintiffs have lost their remedy at law, and they are remediless, unless relief be given in this Court. The jurisdiction of this Court is assumed on the ground of the fraud, and the time will run only from the discovery of the fraud.” [*Alderson*, B.—In that case there was a breach of trust.] It is well established, that the statute runs from the time of the accruing, and not of the discovery, of the cause of action: *Short v. M’Carthy* (b), *Battley v. Faulkner* (c). [*Martin*, B.—It constantly happens that the owner of a coal mine takes coal from an adjoining mine, and by fraud prevents its being found out

(a) 5 Hare, 542.

(b) 3 B. & Ald. 626.

(c) Id. 288.

for more than six years, yet that is no answer to the Statute of Limitations.]

The Court then called on

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J. Wilde for the plaintiffs.—The replications expressly aver, that the plaintiffs were prevented from knowing of the existence of the causes of action by the fraudulent conduct of the defendants. Is it then competent for them to set up a defence which has accrued through their own fraud? It is a maxim of law, that no person shall be allowed to take advantage of his own wrong. Suppose a plaintiff, on going to sue out his writ on the last day of the six years, was forcibly seized and locked up by the defendant until the next morning, could the latter avail himself of the statute? [*Platt*, B.—If the plaintiff's debt was thereby barred, might he not recover the amount as special damage in an action against the defendant for the trespass?] If the plaintiffs can maintain an action against the defendants for fraudulently concealing their wrongful act, and thereby depriving the plaintiffs of their remedy, it would almost follow that the defendants could not take advantage of the statute. The case falls within the principle of the decisions, that, where a person makes a fraudulent representation, and thereby induces another to act upon it and alter his position, the former is concluded from averring against the latter that a different state of things existed at the time: *Freeman v. Cooke*(a). [*Pollock*, C. B.—The statute says, that with respect to certain persons it shall not run, but in all other cases it shall; then how can we alter that, and introduce an exception in favour of other persons? It would open a flood of litigation, if we were to hold that the statute does not run in cases where a fraud has been practised.] In *Granger v. George*(b), which decided that, in trover, the statute

(a) 2 Exch. 654.

(b) 5 B. & C. 149.

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runs from the time of the conversion, although the plaintiff had no knowledge of it, *Abbott*, C. J., founds his judgment on the fact of "there not being evidence of any fraud practised by the defendant in order to prevent the plaintiff from obtaining knowledge of that which had been done." In *Clark v. Hougham*(a), the question, how far fraud may prevent the operation of the Statute of Limitations, was discussed, but not decided.

The second count discloses a good cause of action. It alleges, that the defendants, having committed certain trespasses against the plaintiffs, fraudulently did certain other wrongful acts, of themselves trespasses, and thereby prevented the plaintiffs from discovering the previous trespasses until after their remedy was barred by the statute. That is either a count in trespass, with special damage in respect of the loss of remedy by action, or it is a count in case for fraudulently depriving the plaintiffs of their right of action. [*Platt*, B.—It is, at all events, a good count for plugging up the plaintiffs' pipes. *Alderson*, B.—That is, surely, a good cause of action.]

Bovill, as to the second count.—The gravamen charged in this count is the concealment of a cause of action until the remedy became barred by the Statute of Limitations; the other allegations are merely by way of inducement. It is in truth a count founded on a deceit, and, before the Common Law Procedure Act, might have been joined with a count in case. The concealment of a cause of action until the remedy is barred, is not of itself any cause of action.

POLLOCK, C. B.—We are all (b) of opinion that the second count is good: for it alleges that the defendants did certain wrongful acts, in consequence of which the plaintiffs

(a) 2 B. & C. 149. (b) *Pollock*, C. B., *Alderson*, B., and *Platt*, B.

sustained damage. There must, therefore, be judgment for the plaintiffs on the demurrer to that count. Upon the demurrers to the replications, there must be judgment for the defendants.

Judgment accordingly (a).

(a) See *Bres v. Holbeck*, 2 Doug. 654 a.

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THE declaration stated that, after the passing of the Railway Passengers Assurance Company's Act, A.D. 1852, in consideration of the sum of 1*l.* paid by the plaintiff to the defendants, the defendants made and entered into a certain ticket and contract of assurance in writing with the plaintiff, which ticket and contract, with the conditions thereon indorsed, were and are in the words and figures following, that is to say:—

“Railway Passengers Assurance Company,

“EMPOWERED BY SPECIAL ACT OF PARLIAMENT, 12 & 13 VICT. c. 40.

“Capital, one million.

“Offices—No. 3, Old Broad Street, London.

“Insurance ticket—1000*l.* No. A 4113.—Premium, 1*l.*

“Mr. Robert Theobald, of 11, Grove Terrace, Kentish Town, is hereby assured by the Railway Passengers As-

The plaintiff effected with the defendants a contract of assurance, which stated that the plaintiff was thereby assured by the Railway Passengers Assurance Company in the sum of 1000*l.*, to be payable to his legal representatives in the event of death happening to the assured from railway accident whilst travelling in any class carriage on any line of railway in Great Britain or Ireland; or a pro-

portionate part of the 1000*l.* will be paid to the assured himself in the event of his sustaining any personal injury by reason of such accident. The plaintiff was travelling in a railway carriage to a certain place, and on the arrival of the train at the railway station there, and after it had stopped, the plaintiff, in stepping out of the carriage, without any negligence on his part, slipped off the iron step, whereby he sustained an injury:—*Held*, first, that this was a “railway accident” within the meaning of the contract of assurance.

Secondly, that the damage could not be estimated by the proportion which the injury bore to the amount payable on loss of life.

Thirdly, that the plaintiff was entitled to recover damages for the expense and suffering occasioned by the injury, but not for his loss of time or loss of profit.

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surance Company in the sum of one thousand pounds, to be payable to his legal representatives according to the conditions hereupon indorsed in the event of death happening to the said assured from railway accident whilst travelling in any class carriage on any line of railway in Great Britain or Ireland: or a proportionate part of the said 1000*l.* will be paid to the assured himself in the event of his sustaining any personal injury by reason of such accident: such insurance to be in full force and effect from the date hereof until the 17th day of May, 1854.—
 Dated Tuesday, the 17th day of May, A.D. 1853.

“Received 1*l.*

— WY. JNO. FRANK, Secretary.

“ALFRED ROSE, Cashier.”

“Railway Passengers Assurance Company.—Conditions of Assurance.

— 1st. The assured in case of personal injury, or his legal representatives in the event of his death, must give notice thereof in writing to the company, at their offices in London, within a reasonable time after the said injury or death, otherwise the assurance hereby effected will be null and void.

— 2ndly. Such notice must set forth the Christian and surname, occupation, and address of the assured, and of the person giving the notice.

— 3rdly. In the event of any dispute arising as to the sum to be paid to the assured by way of compensation for personal injury, the same shall be settled by arbitration, in conformity with the provisions of the Company's Special Act of Parliament.

— 4thly. As the company limits the risk on any one life to the sum of 1000*l.*, no second ticket of this company for the insurance of such life will be available during the period for which this ticket is issued.”

The declaration then stated that, after the 17th of May,

1853, and before the 17th of May, 1854, the plaintiff was lawfully travelling in a certain railway carriage on a line of railway in Great Britain; and whilst so travelling, he sustained a personal injury by reason of a *railway accident*, within the true intent and meaning of the said ticket and contract of assurance, and which was not caused by the negligence or wilful act of the plaintiff; whereby the plaintiff became lame and disabled from attending to his business, and so continued for a long time, and suffered great pain, and was compelled to remain at several places at great expense in his said journey before arriving at his house, and to procure medical attendance; and incurred a great loss of time and business, both at home and abroad, whereby he sustained and was put to great loss and expense. Averments, that the plaintiff did all things necessary on his part to entitle him to receive from the defendants, by reason of the premises, a proportionate part of the sum of 1000*l.* in the said ticket and contract of insurance mentioned; and that the defendants received from him such notice in writing as is therein mentioned and provided for after the said accident, and more than thirty days before the commencement of this suit, and have not at any time offered to the plaintiff any amount of compensation whatever. And that, in consequence of the defendants denying and repudiating their liability to pay any sum whatever to the plaintiff by reason of the premises, no dispute ever arose between the plaintiff and the defendants as to the sum to be paid by them to the plaintiff by way of compensation for such personal injury as aforesaid. Yet the defendants, having full notice of the premises, have not paid to the plaintiff any sum of money in respect of the said personal injury, but wholly refuse so to do.

Plea. That the said injury of the plaintiff was caused by the negligence of the plaintiff, and not by reason of any railway accident within the true intent and meaning of

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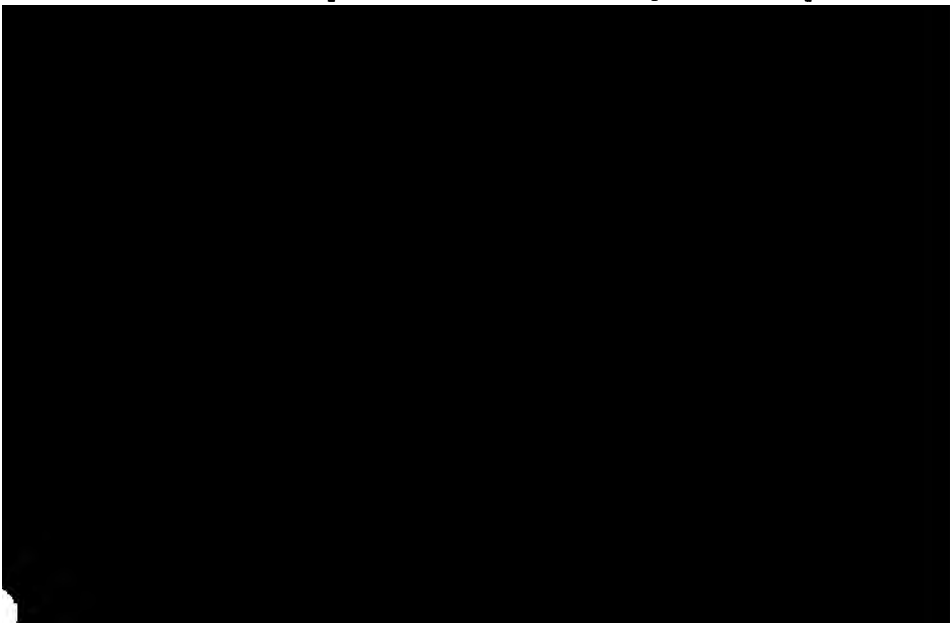
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the ticket or contract of insurance in the declaration mentioned; upon which issue was joined.

At the trial, before *Pollock*, C. B., at the London Sittings after last Hilary Term, the following facts appeared:— The plaintiff was a bookseller in London, and his business required him to make frequent journeys to the north of England and Scotland. On the 17th of May, 1853, the plaintiff effected an insurance with the Railway Passengers Assurance Company, upon the terms stated in the contract of assurance set out in the declaration. On the 21st of June following, the plaintiff, who was about to go by railway from Birmingham to Shrewsbury, became a passenger in a second class carriage from Birmingham to Wolverhampton, for which place he had taken a ticket, it being necessary to go by another train from the Wolverhampton station to Shrewsbury. On the arrival of the Birmingham train at the Wolverhampton station, and after it had stopped, the plaintiff, in stepping out of the carriage in which he was, slipped off the iron step and fell between the platform and the carriage, by which his legs were seriously injured. During the day there had been much rain, which, it was suggested, made the step slippery. In consequence of the accident, the plaintiff was prevent-



the loss of life. The learned Judge reserved the first point, and he left it to the jury to say how much the plaintiff was entitled to for medical and other expenses, and for loss of profit, telling them that he was not entitled to recover for loss of profit and also for loss of time. The jury found a verdict for the plaintiff for 34*l.* 19*s.* for medical attendance and expenses, and 100*l.* for loss of time or loss of profits; and leave was reserved to the defendants to move to enter a nonsuit, or to reduce the damages.

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Macaulay, in the following Term, obtained a rule nisi accordingly; against which

Bramwell and *Phipson* shewed cause in the present Term (June 2).—First, this was a “railway accident,” for which the company are liable. The meaning of that term is, “an accident happening to a person whilst travelling by railway.” The company was formed “for the purpose of insuring compensation for loss of life, or for personal injury to persons travelling by railway.” Further powers were conferred on the company by the 12 & 13 Vict. c. xi., but nevertheless their power of insurance was limited to railway accidents. That statute was repealed (except as to certain provisions relating to the stamp laws) by the 15 Vict. c. c., which recites, that “it would be attended with advantage, if additional facilities were afforded for the insurance by the company of railway passengers for particular journeys, or for definite periods of time, or for life, in such sums as may be agreed upon, and also if powers were granted to the company for the insurance of persons against bodily injury or death, caused by accident generally.” The 3rd section enacts, that it shall be lawful for the company “to insure compensation for loss of life, or for personal injury to persons travelling by railway, whether arising from accident or negligence; and that, in addition to such power, it shall be lawful for the

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company to insure compensation to any person or his legal personal representatives, for or on account of any injury caused by any accident whatever, other than accidents occurring to persons travelling by railways" (a). There-

(a) The following sections were also referred to:—

Sect. 4. "That every contract, ticket, or other instrument, whereby the company shall become bound to pay any sum of money by way of compensation to any person or his legal representatives, for or on account of any injury caused by accident generally, whether resulting in death or otherwise, which may be sustained by such person, shall be deemed and taken to be a contract of insurance within the meaning and for the purposes of this Act; and any such contract may be in such form, and may be issued in such manner as the company may determine, and may contain such conditions, not inconsistent with the provisions of this Act, as may be specified therein: Provided nevertheless, that, in all cases, contracts or tickets of insurance for particular journeys by railway, issued under the authority of this Act, shall be held to be a valid execution on the part of the company of the contract set out in the Schedule to this Act; and that no other matter or thing shall be required to be done by the company in order to legally bind the company to the due performance thereof."

Sect. 12. "That, in the event

of any personal injury, within the meaning of this Act, occurring to any bonâ fide holder of an insurance ticket during the journey by railway insured, or to any party insured against injury by any other accident, such holder or party, or, in case of death resulting from such injury, then the legal representative of such holder or party, shall, within fourteen days after the occurring of such accident or death, give or cause to be given a notice in writing to the company, at their office in London, of such injury and the nature thereof, or of such death, together with a statement of the christian and surname, and of the occupation and address of the party injured or who may have died; and in case such notice and statement shall not have been given as aforesaid, such holder or party or legal representative shall be deemed to have no claim on the company in respect of such injury or death."

Sect. 13. "That, in cases other than those of death, such holder or party so injured as aforesaid shall, within fourteen days after the occurring of the said injury, and at the request of the company, submit either at the office of the said company or at the address given by him as afore-

fore the insurance comprises two classes, viz. injuries caused by railway travelling, and injuries arising from any

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said, at the option of such holder or party, or at some other convenient place to be agreed upon between the company and the holder or party injured, to be examined by the medical officer of the company, and shall give all such information to the company as the company may reasonably require in order to ascertain the nature and extent of the said injury."

Sect. 14. "That, in all cases of death in consequence of any injury within the meaning of this Act, the company may cause the body to be examined by their medical officer at any time previous to the day of the interment thereof."

Sect. 15. "That in all cases other than those of death, within thirty days after the company shall have received such notice in writing as aforesaid, the company shall offer such amount of compensation as to the company shall seem just and reasonable, in proportion to the extent of the injury and to the sum payable in case of death, regard being had to the particular premium of insurance which shall have been paid by such holder or party, by leaving a notice thereof at the address given by him as aforesaid."

Sect. 35. "That no contract of the company, or any compensation received or recoverable by virtue of such contract, either under this Act or otherwise,

shall be held to prejudice or affect any rights of action, claim, or demand, which any person or his executors or administrators may have against any other company, or any person, either at common law or by virtue of an Act passed in the ninth and tenth years of the reign of her present Majesty, intituled 'An Act for compensating the families of persons killed by accidents,' or any other Act of Parliament, for the injury, whether fatal or otherwise, in respect of which such compensation shall have been received or be recoverable."

Schedule referred to in the foregoing Act:—

"Know all men by these presents, that if any person above the age of twelve years, about to travel by railway, shall, on payment of the premium of insurance demanded by the said company in respect thereof, duly obtain any insurance ticket, marked with the marks of the said company, the said company hereby agrees, in consideration of the payment of such premium as aforesaid, with such person as follows: (that is to say), if such person shall, during the particular journey for which such insurance ticket shall have been issued, while travelling by railway, sustain any personal injury whatever, caused by railway accident, then the said company shall pay to such per-

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other cause. But if (as the argument for the defendants would imply), it is only a particular description of railway accidents against which the company insure, then there is a class of accidents happening from travelling by railway which are not insurable, notwithstanding the Legislature has enabled the company to insure against all accidents, whether by railway or otherwise. [*Pollock*, C. B.—Suppose a person suddenly rose from his seat, and struck his head with great violence against the top of the carriage, so as to cause a contusion of the brain, would that be a railway accident? *Parke*, B.—Or suppose a person on getting out, not observing that the window was closed, pushed his head through the glass?] Such cases would not be railway accidents, for they are not accidents peculiar to railway travelling; but a passenger, at the termina-

son, on proof of such injury, such sum, not exceeding the amount declared to be insured by such insurance ticket, as shall, with reference to and in proportion to the whole sum insured and made payable as hereinafter mentioned in case of death, be deemed a reasonable compensation for such injury sustained by such person, such compensation to be ascertained and paid in the manner provided by this Act; and if such person shall die from the effect of such injury within three months after the occurring of the same, then the company shall pay to the executors or administrators of such person, on proof of such death, the whole sum expressed in such insurance ticket: Provided always, that, in case the said company shall, before the death of such person so injured

as aforesaid, have paid any sum of money to such person so injured as aforesaid, as and by way of compensation for such injury, such sum of money so paid as aforesaid may, on the death of such person so injured as aforesaid, after such payment or payments, and within three months after the occurring of the said injury, be deducted by the said company from the sum of money hereby otherwise agreed to be paid by them in the event of such death as aforesaid; and provided always, that the said company shall in no case be liable to pay to the holder of any insurance ticket, or to his executors or administrators, any sum of money in respect of any injury caused by the negligence or wilful act of such holder.—In witness, &c."

tion of his journey, must necessarily step from the carriage on to the platform. The word "railway" is an adjunctive, which describes the quality of the accident. [*Alderson, B.*—The difficulty arises from using in the contract the term "railway accident," instead of following the language of the Act of Parliament. According to the true construction of the 3rd section, the insurance is against accidents to persons when travelling by railway, and accidents not arising from railway travelling. Then the question is, whether a person is "travelling by railway" after the train has stopped.] He is a passenger until he has alighted from the railway carriage. The 35th section shews that this was the meaning of the Legislature. Suppose another railway train negligently ran against the carriage in which the person insured sat; or suppose that some third person put a bar across the line, or that a passenger, in getting out of the carriage, fell, in consequence of weakness induced by illness,—all those would be cases of "railway accident." An accident is not the less a railway accident because some other person might have avoided it.

Secondly. The damages were properly assessed. It is impossible to estimate the damage which a personal injury, as, for instance, the loss of a limb, may bear to the loss of life. [*Alderson, B.*—This is not a contract of indemnity, because a person cannot be indemnified for the loss of life, as he can in case of a house or ship. It is, therefore, necessary to adopt some pecuniary rule.] This is an insurance for a sum not exceeding 1000*l.* where the injury results in death; but the same mode of calculating the damage cannot apply to injury to persons who live. Moreover, the 15th section, which mentions a compensation "in proportion to the extent of the injury and to the sum payable in case of death," has reference to the 12th section, which applies only to an insurance for a

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single journey. [*Alderson*, B.—Though the insurance is for a year, if an accident happens, that is an accident arising from that journey, and the damages ought to be calculated as upon a single journey. The insurance is for all the journeys taken during twelve months; that is a journey ticket; as when a ship is insured for a certain period while on her voyage, that is an insurance for the voyage.]

Sir *F. Thesiger* and *Davison* in support of the rule.—This is not a “railway accident” within the meaning of the contract of insurance. The 3rd section of the 15 Vict. c. c., enables the company to insure against all accidents “to persons travelling by railway,” and also against all accidents whatever. The 4th section provides, that tickets of insurance for particular journeys by railway shall be a valid execution, on the part of the company, of the contract set out in the schedule of the Act. The schedule, however, does not follow the terms of the 3rd section, but says that, if any person shall, “while travelling by railway, sustain any personal injury whatever, *caused by railway accident*,” &c.; and the contract of insurance is against injury happening from railway accident whilst travelling on a railway. The term “railway accidents” does not mean all accidents while travelling by railway, but accidents peculiar to that mode of travelling. They may be defined as accidents connected with the train, whether in motion or not, and whether occasioned by the negligence of the railway company or their servants, or by the act of a stranger, or by some unavoidable cause, or by collision with another train, and not accidents which result from the act of the party himself, whether in a railway carriage or crossing the line, or on the platform. If the step of a carriage broke through its defective construction while a person was getting out, that might be a “railway accident;” but the act of slipping on a smooth surface is not peculiar to rail-

way travelling. Suppose it had been necessary for the plaintiff to cross the line at the Wolverhampton station in order to get to the train for Shrewsbury, and in doing so he slipped and was injured, would that be a "railway accident?" The term implies some defect, irregularity, or misadventure in the railway conveyance. Here there was nothing whatever amiss about the railway.

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Then with respect to the damage, loss of profit and loss of time cannot be taken into consideration. The contract limits the compensation to *personal injury*. The 12th and 13th sections of the 15 Vict. c. c., require the assured, within a certain time, to give notice to the company of any personal injury, and submit to a medical examination. The object of that is to enable the company to offer compensation under the 15th section; and the only injury to which the attention of the company is to be called for that purpose is personal, that is, bodily injury. If a house is burnt the assured never receives compensation for his loss of profit whilst the house is being rebuilt. The rule is thus laid down in *Hadley v. Baxendale*(a):—"Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. [*Martin, B.*, referred to the Ancient Laws and Institutes of Wales, "The Venetian Code," Bk. 3, c. 22.]

The Court intimated their intention to take time for consideration, suggesting, however, that the parties should come to terms.

Cur. adv. vult.

(a) 9 Exch. 354.

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POLLOCK, C. B., now said.—In this case a motion was made to reduce the amount of damages, and also to enter a nonsuit. The objection to the verdict was, that the accident in respect of which the action was brought was not a railway accident, within the meaning of the policy of insurance entered into by the defendants. The objection to the amount of damages was, that the defendants were not liable to compensate the plaintiff for his loss of time or loss of profit, but only for the personal injury sustained in consequence of the accident, assuming it to be a railway accident. The Court took time to consider its judgment, hoping that in the meantime the parties might come to some arrangement. But it has been intimated to us that there is a desire on the part of the company to obtain the judgment of the Court on the points raised, and consequently they are unwilling to enter into any arrangement.

The facts of the case were these:—The plaintiff, who was about to take a journey by means of two distinct railways, had insured himself with the defendants against death or personal injury arising from railway accident whilst travelling, the contract fixing the damage in the former event at 1000*l*. In getting out from one of the carriages on a rainy morning, his foot slipped, whereby he was severely injured. It was conceded by the defendants' counsel, that there was no negligence on the part of the plaintiff in reference to the accident. And the first question is, whether this is a railway accident within the meaning of the policy. We are of opinion that it is. However much the company may desire that we should lay down a general rule as to what is a railway accident, I do not know that we are called on, or should be doing our duty, were we to lay down any rule beyond what is necessary to decide the actual case before us. Considering the great number of particulars that may enter into the decision of questions of this nature, and the very compli-

cated character they may assume under circumstances that at present we may not anticipate, I think, (and I believe the rest of the Court concur with me in thinking), that in the single instance brought before us under certain circumstances, some of which are not of a general nature, it would be assuming too much to lay down a rule to govern all cases. On the present occasion, it is quite plain that the plaintiff was a traveller on the railway; it is quite plain, that though at the time of the accident his journey had in one sense terminated, by the carriage having stopped, he had not ceased to be connected with the carriage, for he was still on it. The accident also happened without negligence on his part, and while doing an act which as a passenger he must necessarily have done, for a passenger must get into the carriage, and get out of it when the journey is at an end, and cannot be considered as disconnected with the carriage and railway, and with the machinery of motion, until the time he has, as it were, safely landed from the carriage, and got upon the platform. The accident is attributable to his being a passenger on the railway, and it arises out of an act immediately connected with his being such passenger. Under these circumstances, we think this was a railway accident within the meaning of the policy; and consequently the action is in our judgment maintainable, and so much of this rule as prays for a nonsuit must be discharged.

In order that the question raised at the trial respecting damages might be considered by the Court in banc, the verdict of the jury was taken separately. They found for medical attendance and expenses 34*l.* 19*s.*, for loss of time or loss of profit 100*l.* At the trial, the plaintiff made his claim for both. I thought it quite clear that he could not claim for loss of time and also for loss of profit, which are the same thing under two different forms;—if indemnified for time he had no right to claim for profit, and if indemnified for profit he had no right to claim for time. I also had considerable doubt whether he was entitled to claim

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either, and I therefore directed the jury to find for one only, with leave to the defendants to move to strike that out if the Court should think it right. On considering the arguments used on both sides, we think that the verdict should be reduced to 34*l.* 19*s.* We are of opinion that the insurance must be treated in the same way, whether considered with reference to the death of the party or to an accident which inflicts injury short of it: and we think that, in considering the damage done to the traveller, the consequential mischief of losing some profit is not to be taken into consideration; otherwise, a passenger whose time or business is more valuable than that of another would for precisely the same personal injury receive a greater remuneration than that other. What the insurance company calculate on indemnifying the party against is the expense and pain and loss immediately connected with the accident, and not remote consequences that may follow according to the business or profession of the passenger. The verdict must therefore be reduced to 34*l.* 19*s.*, and so far the rule must be made absolute.

ALDERSON, B.—It was contended that the estimate of damage depended on some proportion to be ascertained between the amount of injury caused by the accident and the amount of loss in the event of the death of the party, in which latter event the damage is limited to 1000*l.*, the sum insured. I, at least, think no such proportion exists. The true measure of damage is the personal injury resulting from the accident, not exceeding however the sum which the company would have to pay in the case of death. As to railway accidents, my notion of a railway accident is an accident occurring in the course of travelling by a railway, and arising out of the fact of the journey. It does not necessarily depend on any accident to the railway or machinery connected with it.

Rule to enter a nonsuit discharged, rule to reduce the damages to 34*l.* 19*s.* absolute.

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of W. DODINGTON.**

June 5.

COVENANT.—The declaration stated, that W. Dodington in his lifetime, on the 1st of September, 1820, by his deed covenanted with the plaintiff to pay him during the joint natural lives of W. Dodington and the plaintiff, an annuity or clear yearly rent-charge of 150*l*., payable half-yearly, of which annuity or rent-charge forty half-years immediately preceding the death of W. Dodington, on the 25th of February, 1852, are due and unpaid.

The limitation prescribed by the 3 & 4 Will. 4, c. 27, does not apply to an action on a collateral covenant for payment of a rent charged on land, and the covenantee may recover damages for the breach of that covenant, notwithstanding his right to recover the rent-charge is barred by the above statute.

Fourth plea.—That the deed mentioned in the declaration was dated on the day and year therein mentioned; and that by the same deed W. Dodington, in consideration of his natural love and affection towards the plaintiff his brother, and of a nominal consideration of 10*s*., granted to the plaintiff, to hold for an estate in the deed mentioned, a rent of 150*l*. per annum, issuing out of and charged upon certain lands, whereof W. Dodington was then seised in fee simple, payable to the plaintiff half-yearly, on the 29th of September and 25th of March in every year; and the first payment to be made on the 29th of September, 1820. And W. Dodington thereby empowered the plaintiff to distrain for the arrears of the said rent-charge in and upon the said lands in manner therein mentioned; and the said lands were and still are of an annual value amply sufficient to cover the said rent; and the covenant in the declaration mentioned is accessory and subordinate to the said grant. And the defendants in fact say, that this action is an action to recover a rent, and is not brought within twenty years next after the time at which the right to bring such an action first accrued to the plaintiff, but long, to wit thirteen years and upwards, after the expiration of such period of twenty

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years, such period having in fact expired on the 29th of September, 1840, and after the plaintiff's title to the said rent had become and was extinct by force of the statute next hereinafter referred to; and no acknowledgment was ever given or made within the intent of the 3 & 4 Will. 4, c. 27, or within the intent and meaning of the 3 & 4 Will. 4, c. 42. And the plaintiff was not, when the right to bring such action first accrued to him, or at any time since, under any disabilities mentioned in the said Acts, or either of them.

Fifth plea.—So far as the declaration relates to the arrears of the said rent-charge, which accrued due after the 29th of September, 1840, the defendants say, that the fourth plea (which they crave leave to refer to for the sake of avoiding prolixity) is true.

Demurrers to both pleas, and joinders therein.

Watson in support of the demurrers.—First, the limitation prescribed by the 3 & 4 Will. 4, c. 27, does not apply to an action of *covenant* for non-payment of a rent-charge. That statute is intituled "An Act for the Limitation of Actions and Suits relating to *real property*, and for simplifying the remedies for trying the rights thereto." The 2nd section enacts, that "no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." That enactment only bars the remedy in cases where, before the statute, the party would have been en-

titled to an assise. In *Grant v. Ellis*(a), Rolfe, B., in delivering the judgment of the Court, defines the meaning of the word "recover," as used in that section with respect to *land*, and concludes that it must have been intended to be used in the same sense as regards *rent*; and that, therefore, the proceeding by action means some proceeding in which the judgment would be "quod recuperet seisinam." The term "rent" received a similar construction in the case of *Paget v. Foley*(b). An action of debt on the 2 & 3 Edw. 6, c. 13, for not setting out tithe, is not an action to recover tithe within the meaning of the 3 & 4 Will. 4, c. 27: *Dean of Ely v. Cash*(c). The real remedy against the land, and the personal remedy on the collateral covenant, are totally distinct securities. If the rent was assigned, the covenant would still remain: *Milnes v. Branch*(d), *Randall v. Rigby*(e). A stranger might have covenanted for payment of the rent. [Pollock, C. B.—The statute has no application whatever to an action of covenant. I cannot distinguish between a covenant of this kind and a covenant to pay 150*l.* at the end of the first year, 150*l.* at the end of the second year, and so on.] The 42nd section shews, that the Legislature bore in mind the distinction between an action to recover a *rent* and an action to recover *damages* in respect of arrears of rent. The limitation in bar of an action on a covenant of this kind is twenty years, under the 3 & 4 Will. 4, c. 42, s. 3: *Strachan v. Thomas*(f); but if the 3 & 4 Will. 4, c. 27, be held also to apply to this case, there will be the anomaly of two statutes passed in the same session providing different periods of limitation in respect of the same claim. In *Humfrey v. Gery*(g), where it was held that the limitation in bar of the right to recover the ar-

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(a) 9 M. & W. 113.

(b) 2 Bing. N. C. 679; 3 Scott, 120.

(c) 15 M. & W. 617; 2 De G., Mac., & G. 459, nom. *Dean of Ely*

v. *Bliss*.

(d) 5 M. & Selw. 411.

(e) 4 M. & W. 131.

(f) 12 A. & E. 536.

(g) 7 C. B. 567.

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years of a rent-charge was six years under the 3 & 4 Will. 4, c. 27, there was no collateral covenant, as in this case. A further point is raised by the fifth plea, viz. that, inasmuch as by the 34th section of the 3 & 4 Will. 4, c. 27, the right to the rent was extinguished after twenty years discontinuance of its receipt, the remedy on the covenant is also gone. But the extinction of the rent, as a rent charged on land, cannot affect the personal right to recover damages for the breach of a covenant to pay it. [Pollock, C. B.—Suppose there had been only this covenant to pay the annuity, and no payment had been made for thirty years, the covenant would not have been gone; then why should it because the annuity is also charged on land? A covenant of this kind is not different from an ordinary covenant to pay rent, in which case, although no rent has been paid for twenty years, the last six years may be recovered.]

Butt contrà.—This annuity is a *rent* within the meaning of the 2nd and 3rd sections of the 3 & 4 Will. 4, c. 27. Then, by the 34th section, the estate in the rent was extinguished on the 29th of September, 1840. It is clear, therefore, that if there had been no covenant, the plaintiff could not have recovered. The covenant is not an independent contract to pay a yearly sum of money, but a covenant to pay that particular annuity charged on the land. But the annuity has ceased to exist, and consequently the covenant has no operation.

POLLOCK, C. B.—We (a) are all of opinion that both pleas are bad, and our judgment must be for the plaintiff.

Judgment for the plaintiff.

(a) Pollock, C. B., Alderson, B., and Platt, B.

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TIDMAN v. AINSLIE.

June 7.

LIBEL—The declaration stated, that the plaintiff was one of the secretaries of a society called “The London Missionary Society,” at a certain salary; yet the defendant falsely and maliciously printed and published of and concerning the plaintiff, and of and concerning the plaintiff as such secretary, a false and malicious libel, in the form of a pamphlet, intitled “The defence of the innocent, the Rev. E. Davies and Mrs. Davies, from the charges brought against them by the officers of the London Missionary Society (meaning amongst others the plaintiff as such secretary), and an Exposition of the Ecclesiastical Proceedings of the Congregational Board of Ministers in relation to Mr. Davies, dedicated to the Congregational Churches and Pastors of the British Empire;” in a certain part of which said pamphlet, purporting to be a letter from the said Mr. and Mrs. Davies to the directors of the London Missionary Society, was contained the several false, malicious, and libellous matters following of and concerning the plaintiff, and of and concerning the plaintiff as such secretary, &c.—The declaration then set out the letter.

In an action for libel, it is no justification that the libellous matter was previously published by a third person, and that the defendant, at the time of his publication, disclosed the name of that person, and believed all the statements contained in the libel to be true.

Plea, that the words in the declaration mentioned are an extract from an original letter which had been addressed by the said Mr. and Mrs. Davies to the directors of the London Missionary Society before the publishing of the said last-mentioned words, and that a copy of such last-mentioned letter had then been given by the said Mr. and Mrs. Davies to the defendant, and that the defendant then believed all the statements made in the said letter, and particularly the said words of the said letter so published as aforesaid, to be true. And the defendant further saith, that the London Missionary Society is a society

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supported by contributions obtained from the congregational churches and pastors of the British empire.

Demurrer, and joinder therein.

Lush, in support of the demurrer, argued that the subject matter of the plea afforded no justification for the libel.

The Court called on

Stammers to support the plea.—The plea is within the principle of the fourth resolution in *The Earl of Northampton's case*(a), viz. "In a private action for slander of a common person, if J. L. publish that he hath heard J. N. say that J. G. was a traitor or thief; in an action on the case, if the truth be such, he may justify." [*Martin*, B.—In a note to *Craft v. Boite*, 1 Wms. Saund. 244, it is said, "The doctrine of *Lord Northampton's case*, as above laid down, has at all times been looked at with disapprobation, and has lately been wholly denied to be law."] The doctrine has no doubt been questioned, but has never been overruled by competent authority. On the contrary, in the year 1796, Lord *Kenyon*, C. J., in delivering judgment in *Davis v. Lewis*(b), says, "*The Earl of Northampton's case* is precisely in point: If a person say that such a particular man (naming him) told him certain slander, and that man did in fact tell him so, it is a good defence to an action to be brought by the person of whom the slander was spoken; but if he assert the slander generally, without adding who told it to him, it is actionable. . . . The justice of the case also falls in with the decisions on this subject. It is just, that when a person repeats any slander against another, he should at the same time declare from whom he heard it, in order that the party injured may sue the author of the slander." [*Platt*, B.—In

(a) 12 Rep. 133.

(b) 7 T. R. 17.

M'Pherson v. Daniels(a), *Bayley, J.*, expresses his disapprobation of the doctrine laid down by Lord *Kenyon*.] Again, in the year 1804, *Lord Northampton's case* was recognised as law by the Court of King's Bench, in the case of *Woolnoth v. Meadows*(b), where Lord *Ellenborough, C. J.*, says, "The rule in *Lord Northampton's case*, confirmed in *Davis v. Lewis*, is, that slanderous words can in no case be justified upon the report of another, unless the name of the original slanderer be given at the time." The law continued unquestioned until the year 1821, when, in the case of *Lewis v. Walter*(c), it was considered that the rule had been laid down too largely, and ought to be confined to cases where the repetition of the slander is made without malice, and upon a fair and justifiable occasion. [*Alderson, B.*—There *Holroyd, J.*, says, with reference to *Lord Northampton's case*, "The book in which that case is found is not so accurate as the rest of the reports of Lord *Coke*, not having been published by him in his lifetime, but from his notes afterwards."] In *M'Pherson v. Daniels*(a), the doctrine in *Lord Northampton's case* received this further qualification—that it must be shewn that the person repeating the slander believed it to be true. This plea contains an averment to that effect. [*Pollock, C. B.*—*De Crespigny v. Wellesley*(d) is an express authority, that, in an action for libel, it is no plea that the defendant had the libellous statement from another, and upon publication disclosed the author's name.] It is true that the decisions have been respecting *oral* slander; but it is an established maxim, that where there is the same reason, there is the same law. The reason given by Lord *Kenyon*, in *Davis v. Lewis*(e), for the doctrine in *Lord Northampton's case*, viz. "in order that the party injured may sue the author of the slander," applies equally to libel.

(a) 10 B. & C. 263.

(d) 5 Bing. 392.

(b) 5 East, 463.

(e) 7 T. R. 17.

(c) 4 B. & Ald. 605.

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There is another reason which applies to both, and which was probably the true ground of the original decision, viz. the difference between stating that a man is a thief, and that "I heard J. S. say that he was a thief." In the former case there is a distinct charge, which the party is bound to justify, by alleging and proving that the person charged was guilty of theft; but in the latter case there is no charge of theft, but only an assertion of having heard J. S. accuse the party of theft: *Crawford v. Middleton* (a).

POLLOCK, C. B.—We (b) are all of opinion that the plea is bad. The doctrine in *Lord Northampton's case*, assuming it to be law, has never been applied to written slander, in which the repetition, by being more largely circulated, produces a greater injury to the individual slandered. Our judgment is therefore for the plaintiff.

Judgment for the plaintiff.

(a) 1 Lev. 82.

(b) *Pollock, C. B., Alderson, B., Platt, B., and Martin, B.*

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May 31.

MILLS (Clerk to the Trustees for Lighting &c. the Parish of St. Luke, Middlesex) *v.* **RYDON** and Another (Churchwardens of St. Matthew's Church, City Road).

THIS was an action to recover 16*l.* 7*s.* 9*d.*, being the amount alleged by the plaintiff to be due from the defendants for a paving rate in respect of the church hereinafter mentioned.

In pursuance of the provisions of the Common Law Procedure Act, 1852, s. 46, and by order of *Alderson*, B, the following special case was stated, without pleadings:—

The plaintiff is clerk to the trustees appointed under the 50 Geo. 3, c. clxix., intituled "An Act for making more effectual provision for lighting, watching, paving, cleansing, regulating, and improving the streets and other public places in the parish of St. Luke, in the county of Middlesex." The defendants were, at the time of making the after-mentioned rate, the churchwardens of St. Matthew's Church, City Road, a church erected under the provisions of the 6 & 7 Vict. c. 37, intituled "An Act to make better provision for the spiritual care of populous parishes," having a district called "The New Parish of St. Matthew." The church is situate wholly within the parish of St. Luke.

The defendants were appointed churchwardens of the church of St. Matthew, City Road, as aforesaid, under the provisions of the 6 & 7 Vict. c. 37. No pew rents have ever been payable in respect of the pews of the said church. The said church was completed and opened for the celebration of divine service in the month of April, 1847; and from that time until 1849, the trustees, acting under the said statutes, have from time to time rated the said church for the purpose of paving and

A district church, erected under the provisions of the 6 & 7 Vict. c. 37, is not exempt from being rated under the 50 Geo. 3, c. clxix., and 57 Geo. 3, c. xxix., and the churchwardens are liable to pay the rate, although they have no parochial funds for that purpose.

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repairing the pavements of the parish of St. Luke; and four quarters rate, ending Midsummer, 1849, have been paid by the churchwardens of St. Matthew's for the time being out of their own pockets, and were subsequently repaid to them by voluntary contributions of members of the congregation.

On the day of , 1849, a rate was, in conformity with the provisions of the said Acts, made for repairing the pavement of the said parish; and, by the said rate, the said church of St. Matthew, City Road, was assessed; and the claim now made is for 16*l.* 7*s.* 9*d.* for arrears of such paving rate up to Midsummer-day, 1850. At the time when the said rate was made, the defendants were the churchwardens of the said church of St. Matthew. Notice of the said rate was given to them whilst they were such churchwardens, and they were required to pay the same, but they refused to do so, denying the liability of their said church to be rated under either the 50 Geo. 3, c. clxix. or 57 Geo. 3, c. xxix (a). In making the said

(a) The following provisions of those statutes formed part of the case:—

50 Geo. 3, c. clxix. s. 25 enacts, "That the vestrymen of the said parish shall, on Thursday next after the 24th day of June in every year, meet together, and shall settle, ascertain, and estimate the respective sums of money necessary to be raised by a just and equal pound rate for the payment and discharge of all expenses for lighting, cleansing, and watching the streets, &c., and places within the said parish &c., and of paving or repairing the pavements of any streets &c. within the said parish."

Sect. 27 requires the vestry-

men yearly to meet together, within twenty-eight days after the several sums to be raised for the purposes aforesaid have been ascertained, and sign two rates or assessments, one for lighting, cleansing, and watching, and the other for paving, to be "laid on all persons who shall inhabit, hold, occupy, or be in possession of or enjoy any messuages, tenements, lands, grounds, house, shop, coachhouse, stable, cellar, vault, warehouse, or other building or hereditament within the said parish."

Sect 100. "And forasmuch as it is reasonable, that all public buildings, &c., should be rated towards the purposes of such

rates, the trustees duly observed the formal requirements of the said statutes.

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part of this Act as relates to the paving and repairing the pavement of the said parish, it is hereby further enacted, That it shall and may be lawful to and for the vestrymen or trustees, in any rate or assessment to be made for paving or repairing the pavement of and within the said parish, from time to time to rate and assess towards the said purposes of this Act the parish church, parochial and other chapels, meeting houses, places for religious worship, hospitals, public schools, and other public buildings within the said parish, which now is or hereafter may be built, at a rate not exceeding 1s per square yard, in any one year, of the pavement paved or repaired under the direction of the said trustees, situate, lying, and being in any such square, street, or place, and adjoining to, or abutting on, such parish church, parochial and other chapels, meeting houses, places for religious worship, hospitals, public schools, and other public buildings respectively, or the entrance to the same, &c., and the said rate or rates, assessment or assessments, to be made and paid for such parish church, parochial and other chapels, meeting houses, places for religious worship, hospitals, public schools, and other public buildings, &c., shall be paid by the churchwardens or chapelwardens for the time being of such churches

or chapels, the deacons, ministers, teachers, or preachers of such meeting houses for the time being, the stewards or housekeepers for the time being of such hospitals, the masters or mistresses for the time being of such schools, and the persons having the care or conduct for the time being of such other public buildings as aforesaid," &c.

By the 30th section of the 57 Geo. 3, c. xxix., intituled "An Act for better paving, improving, and regulating the Streets of the Metropolis, and removing and preventing Nuisances and Obstructions therein," it is enacted "That it may be lawful to and for the commissioners, trustees, or other persons having the control of the pavements of the streets or public places in any parochial or other district within the jurisdiction of this Act, &c., from time to time to rate and assess thereby any cathedral, collegiate or other church or churches, parochial and other chapels, meeting houses, places for religious worship, hospitals, public schools, and all other public buildings within each of such parochial or other districts, which now is or hereafter may be built, and all other place or places which by any local Act or Acts of Parliament, relating to any particular parochial or other district, may be, or are, or is liable to be rated or assessed for those purposes, or any of them,

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The question for the opinion of the Court is, whether the said rate is payable in respect of the said church. If the Court shall be of opinion in the affirmative, the defendants agree that judgment shall be entered up for the plaintiff for the said sum by nil dicit; but if the Court shall be of opinion that the trustees are not entitled to recover, the plaintiff agrees that judgment of nolle prosequi shall be entered up.

Willes argued for the plaintiff (May 31).—The 30 Geo. 3, c. cxlix. s. 100, and 57 Geo. 3, c. xxix. s. 30, empower the trustees to rate the church in question, and direct

at a rate not exceeding in any one year the sum of 1s. for every square yard of the foot, carriage way, and other pavements contained in one half of the entire width of as much of any and every street or public place as shall or may lay before, or at the sides or rear of, or abut upon, or adjoin to such cathedral, collegiate or other church or churches, parochial and other chapels, meeting houses, places the persons following, (that is to say,) the rates or assessments of and for every cathedral or collegiate church by the dean and chapter thereof, and of and for any other churches or parochial chapels, or churchyards, and parochial cemeteries, by the churchwardens or chapelwardens thereof respectively for the time being, and the rates or assessments of or for any hospitals, by the stewards or housekeepers of such

that payment of the rate shall be made by the churchwardens. It will be argued, that, as the churchwardens of a district church have no power to make a rate, or otherwise raise funds to reimburse themselves, the provisions of those statutes do not apply to a church of that description. But the case of *Hopkinson v. Puncher* (a) is an express authority that the churchwardens are not exempt from liability by reason of their want of funds. There the question arose on similar enactments; and this Court considered, that either the churchwardens by necessary implication had power to make a rate to reimburse themselves, or, if not, as the statutes had imposed upon them the duty of paying, they were bound to do so.

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Lush for the defendants.—A church of this description was unknown at the time the 30 Geo. 3, c. cxlix. and 57 Geo. 3, c. xxix. passed. It was erected under the provisions of the 6 & 7 Vict. c. 37; the 9th section of which enables the Ecclesiastical Commissioners to constitute, in populous parishes, separate districts for spiritual purposes. When a church is built and consecrated in any district, it becomes a new parish, and the minister becomes perpetual curate of that parish (b): (Sects. 15, 16). By sect. 17, churchwardens are to be chosen, “who shall do all things pertaining to the office of churchwarden as to ecclesiastical matters in the new parish;” but they have no power to let pews or assess a rate. The 18th section provides, that nothing in that Act contained shall be construed to affect any right, privilege, or liability whatsoever, ecclesiastical or civil, in any parish, chapelry, or district, except as is therein provided. The 100th section of the 50 Geo. 3, c. cxlix. empowers the trustees to rate “the parish church, parochial and other chapels, meeting-houses, places for religious worship, hospitals,

(a) 3 Exch. 95.

(b) See *Edgell v. Burnaby*, 8 Exch. 788.

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public schools, and other public buildings." A district church is not within the language of that enactment, which applies only to buildings to which there is attached some income from which a rate may be defrayed. The 57 Geo. 3, c. xxix., s. 30, does not extend the rating clause in the 30 Geo. 3, c. cxlix., but only defines the mode of assessment. [*Alderson*, B.—How can the master of a public school make a rate upon any one, and yet he is required to pay?] The Legislature seems to have assumed that the school would have some funds. *Hopkinson v. Puncher* (a) was the case of a parish church rated under the provisions of certain Acts of Parliament relating to that particular parish; and the judgment in that case proceeded on the ground, that the statutes, by necessary implication, enabled the churchwardens to make a rate to reimburse themselves. Here there is no power whatever to do so.

Willes, in reply, argued, that the church in question was a "public building," and that the churchwardens were "persons having the care and conduct" of it within the meaning of the 50 Geo. 3, c. cxlix. s. 100.—He cited Burn's Eccles. Law, vol. 1, p. 398, 3rd edit.

Cur. adv. vult.

POLLOCK, C. B., now said:—In this case the question for the opinion of the Court was, whether a certain rate was payable in respect of a church. It appeared that the church was a district church, erected under the provisions of the 6 & 7 Vict. c. 37. [His Lordship then read the 9th and 17th sections of that Act; and the 25th, 27th, and 100th sections of the 50 Geo. 3, c. cxlix.] Now, in the case of *Hopkinson v. Puncher*, it was decided by this Court, upon statutes containing similar language, that the

(a) 3 Exch. 95.

churchwardens were personally liable to the commissioners for the rates, and that the want of parochial funds did not exempt them from liability. In that case the Court intimated, that probably the churchwardens had, by necessary implication, a right to make a rate to indemnify themselves for what they were called upon to pay. But whether in this case there is that power or not, we are of opinion that this is a church within the provisions of the statutes referred to, and therefore liable to be rated; and that the churchwardens are the persons who are to pay the rate. The only question stated in the case is, whether the rate is payable in respect of the church. We are of opinion that it is, and we are further of opinion that it is payable by the churchwardens. The judgment of the Court will therefore be for the plaintiffs.

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Judgment for the plaintiffs.

POPE and Another v. BAVIDGE.

June 7.

DECLARATION on a charterparty, made the 14th of September, 1852 (a), whereby it was mutually agreed be-

A declaration on a charterparty stated, that it was

agreed between the defendant, the shipowner, and the plaintiff, that the ship should proceed to S., and there take on board from the agents of the freighter a full and complete cargo of coals, and there-with proceed to L., and deliver the same at a wharf to the order of the freighter (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind during the said voyage always excepted); that the charter should be in force for six successive voyages, and that they should be made not later than the last day of February, 1853. Breaches, that the ship did not make six successive voyages, and that the defendant would not permit the ship to make more than three voyages. Plea, that, during the three voyages, the ship sustained great damage by dangers and accidents of the seas and navigation, which damage was necessary to be repaired before the ship could commence her fourth voyage; that the defendant forthwith, on the completion of the said three voyages, proceeded to repair, and did repair, the damage; but it could not be repaired, nor could the ship be made fit to commence the fourth voyage until after the last day of February, 1853, had elapsed:—*Held*, that the plea was bad, inasmuch as the inability to perform the voyages within the time specified did not discharge the contract, or afford any excuse for not commencing the fourth voyage.

(a) See *Wheeler v. Bavidge*, 9 Exch. 668, which was an action set out on the same charterparty, and

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tween the defendant, owner of the ship called the *Laurel*, in the river Tyne, and the plaintiffs the freighters, that the said ship, being tight, &c., should, with all convenient speed, proceed to the Pontop and South Shields drop, and there take on board from the agents of the frieghter a full and complete cargo of coals, and being so loaded should therewith proceed to London, and deliver the said cargo at a safe wharf, to the order of the freighter or his assigns, (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind, during the said voyage, always excepted:) the vessel to be delivered at the rate of forty-nine tons per day, six days on demurrage over and above the said lying days at 2*l.* per day. *That this charter shall be in force for six successive voyages, and that they shall be made not later than the last day of February, 1853.*"—Averments: that the ship did afterwards proceed with all convenient speed to the Pontop and South Shields drop, and there take on board from the agents of the freighters a full and complete cargo of coal, and being so loaded did therewith proceed to London, and deliver the same at a safe wharf to the order of the freighter, and did afterwards make two more like successive voyages under the said charterparty; and that the plaintiffs did all things necessary on their part to entitle them to have six successive voyages made and performed under the said charterparty.—Breaches: that the ship did not make six successive voyages as in and by the charterparty was agreed, and that the defendant would not cause or permit the ship to make more than three voyages.

Plea: that the ship made three of the successive voyages in the charterparty mentioned, and in so doing observed and performed all things on the part and behalf of the ship to be observed and performed, so far as related to the said three voyages. That during the said voyages the

ship sustained great damage and injury in her hull and rigging, by means of certain dangers and accidents of the seas and navigation, that is to say, by and through the force and violence of the winds and waves, and which said damage and injury were necessary and proper to be repaired before the ship could commence or make the fourth of the said successive voyages, or could any further observe or perform the same charterparty; that the defendant forthwith on the completion of the said three voyages proceeded to repair and did repair the damage and injury sustained by the ship, but the damage and injury could not be repaired, nor could the ship be made tight, &c., and fitted for the fourth of the said successive voyages, or able to commence or perform the fourth voyage, until after the said last day of February, 1853, had elapsed; and the breach of the charterparty in the declaration mentioned was caused and occurred by and by reason of the premises in the plea aforesaid, and not by or through any default of the defendant.

Demurrer, and joinder therein.

Lush in support of the demurrer.—The plea is bad. The contract is to make six successive voyages by a given time, and the non-performance of any one of them is a breach of that contract. The exception as to the perils of the seas applies only to the particular voyage in which such perils occur, and would excuse a default in completing that voyage, but not in commencing a subsequent one. Even assuming that the plea is an answer to the breach for not performing the voyages by the appointed time, it leaves unanswered the other breach for not commencing the fourth voyage. The limitation as to time was inserted solely for the benefit of the plaintiffs, and merely gave them a right to rescind the contract.—The Court then called on

Unthank to support the plea.—The stipulation in ques-

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tion is a mutual agreement binding both parties for six successive voyages, if they could be performed within the period limited, but not otherwise. If, in the course of the first voyage, the vessel had been totally lost, the defendant would not have been responsible, since that would have been a case within the exception as to the perils of the seas; then why should not that exception apply to a damage which disables the vessel from performing a subsequent voyage? [*Martin*, B.—It might afford an excuse for not performing the voyage in time, but none for not performing it at all. *Platt*, B.—The case resembles an agreement to build a house, and to complete it within a given time.] Here the stipulation as to time qualifies the contract itself. The charter contains no limitation in respect of demurrage, and the plaintiff might have detained the vessel so long that only one voyage could be performed within the period specified. [*Martin*, B.—There is an absolute contract to perform six voyages, and an undertaking that the party will use due diligence to perform them within the time specified. *Alderson*, B.—If the parties had intended that the contract should be at an end, if by reason of the perils of the seas the voyages could not be performed in time, they might have said so.

POLLOCK, C. B.—We (*a*) are all of opinion that the plaintiffs are entitled to judgment.

(*a*) *Pollock*, C. B., *Alderson*, B., *Platt*, B., *Martin*, B.

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THE NORTH WESTERN RAILWAY COMPANY v. WHINRAY.

June 7.

THIS was an appeal from the decision of the judge of the Lancaster County Court. The action was brought to recover the sum of 50*l.*, on the cause of action hereinafter mentioned; and at the trial it was admitted that the facts were as follows:—

The North Western Railway Company were incorporated by "The North Western Railway Act, 1846," for the purpose of making and maintaining certain railways, and for other the purposes therein specified. The trading in coal is not anywhere expressed to be one of such purposes.

In the year 1851, the North Western Railway Company began to purchase coals in Yorkshire for the purpose of conveying them along their lines of railway to Lancaster and other places, and there selling them; and the company being for that purpose in want of an agent to sell such coals for them at Lancaster, they, upon the defendant and the several other persons hereinafter mentioned becoming the obligors of the bond hereinafter mentioned, appointed one T. Latham to be their clerk or agent there, for the sole purpose of selling such coals for them, the company taking from the defendant and the said other persons the said bond as a security for the faithful conduct of the said T. Latham as such clerk or agent.

The case then set out the bond, which was in the ordinary form. The material part of the condition was as follows:—

"Whereas the North Western Railway Company have agreed to appoint T. Latham, of &c., as their clerk or

In January 1851, the defendant, as surety, executed a bond to a railway company, which, after reciting that the company had agreed to appoint L. as their clerk or agent, for the purpose of selling coal, at a yearly salary of 100*l.*, was conditioned for the due accounting by L. of all monies received by him for the use of the company. L. performed the duties of such clerk or agent at the above salary, until May, 1851, when it was agreed between L. and the company to substitute for such salary a commission of 6*d.* per ton on all coal for which he should obtain orders. From that time L. was paid for his services by such commission, which amounted to a larger sum than the fixed salary. In 1852, L. was indebted to

the company for sums which he did not pay over; and the company having sued the defendant on the bond:—*Held*, first, that the bond was valid, although the company had no power to deal in coal. Secondly, that the condition of the bond was restrained by the recital, so that the defendant, as surety, only undertook to be responsible for the faithful conduct of L. whilst he continued clerk at such fixed salary, and consequently the defendant was not liable after the change in the mode of remuneration.

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agent at Lancaster for the purpose of selling coal for the said company *at a yearly salary of 100*l.* per annum*, on his obtaining sufficient sureties for his duly and faithfully accounting to the said company in manner hereinafter mentioned, and for his faithful and honest conduct during the time of his continuance in such coal agency; and whereas E. Whinray, J. Walker, &c. have, at the request of the said T. Latham, and with the approbation of the said North Western Railway Company, agreed to become such sureties, and have for that purpose executed the above-written bond or obligation: Now the condition of the above-written obligation is such, that if the said T. Latham shall and do, from time to time and at all times whenever thereto required, well and satisfactorily account for and pay over and deliver to The North Western Railway Company and their successors all and every sum and sums of money and securities for money, goods, and effects whatsoever, which he the said T. Latham shall receive for their use, &c, the above-written obligation to be void," &c.

The several persons who became obligors of the bond, before and at the time of their doing so, were respectively well aware of all the circumstances before mentioned. Immediately after the execution of the bond, the said T. Latham entered upon the performance of his duties as such clerk or agent, and continued in the same service without any alteration in the duties or responsibilities thereof, until the autumn of 1852. He continued the said employment at the fixed salary mentioned in the bond until May, 1851, when the plaintiffs proposed to the said T. Latham to substitute for the fixed salary mentioned in the bond a commission of sixpence per ton on all the coal for which he should obtain orders, or which should be supplied to parties to whom he had to that time sold. The said T. Latham agreed to this change in the mode of remunerating his services, and the plaintiffs from that

time paid or allowed him the commission aforesaid in lieu of the said yearly salary for his said service. From that time forwards until the end of his employment, the said T. Latham was paid for his services by such commission, which had been calculated by the plaintiffs and the said T. Latham to amount to, and in fact amounted to, a larger sum than the said fixed salary. In the autumn of 1852, it was found that the said T. Latham was indebted to the plaintiffs in the sum of 245*l.* 14*s.* 11*d.* for monies received by him for them by virtue of his said employment, and not by him paid over to them; and it was admitted by the defendant, that, if the objections relied upon by him, as hereinafter mentioned, did not afford him a good defence, the plaintiffs were entitled to recover from him 50*l.*, which, for the purposes of this cause, is to be taken as having been received by the said T. Latham after the above-mentioned change in his salary.

The defendant rested his defence on two objections—first, that the bond was void *ab initio*, because the company were not authorised by law to trade in coal, nor to appoint a clerk or agent for the purpose stated in the bond; secondly, that the change which had been made in the mode of remunerating the said T. Latham for his services as such clerk or agent was such, that the defendant was not bound by the said bond in respect of sums subsequently received by the said T. Latham.

The plaintiffs, in answer to the first objection, contended that, assuming them to have had no authority to trade in coals, a bond for the faithful and honest conduct of their servant and agent employed in such trade was nevertheless valid; and that, even if this objection would have been available, if made by an obligor who had executed the bond in ignorance of the circumstances of the case, it was not available for the present defendant, he and the other obligors having respectively executed the bond with full knowledge of the circumstances connected with such

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trading and conveying of coals by the plaintiffs. As to the second objection, the plaintiffs contended that the above-mentioned change in the mode of remuneration did not discharge the defendant with respect to sums subsequently received by the said T. Latham. The learned judge allowed both of the objections, and gave judgment for the defendant.

The question for the opinion of the Court is, whether the learned judge was right in allowing both of the objections, or either of them: if so, the judgment of the county court is to be confirmed; but if he ought to have disallowed both of the objections, the judgment of the county court is to be vacated, and judgment entered for the plaintiffs for 50*l*.

Hall for the appellants.—The first question is, what is the effect, as regards a surety, of a bond for the fidelity of an agent in a trade which a railway company has no power to carry on. It is submitted that there is nothing illegal in the bond, and that the agent is bound to account for and pay over to the company all monies received by him. [The Court then intimated that it was unnecessary to argue that point (*a*).] The question then is, whether the

(*a*) There have been several decisions on this subject in the American Courts. In the case of *Little v. O'Brien*, 9 Massachusetts, 423, an Act which incorporated an insurance company required them to invest their stock in certain specified funds, and also required the shareholders to pay in money. The company, instead of such investment, received of several of the shareholders their promissory notes, which were from time to time renewed. The plaintiff having

sued for the benefit of the company on a note given to them by the defendant, who was a shareholder, it was held, that the defendant could not avail himself of the misconduct of the company to avoid payment, though the latter might be liable to forfeit their franchise. So, where a company, incorporated for the purpose of carrying on a particular manufacture, sold merchandise generally, it was held, in an action against a purchaser, that he could not object that the com-

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surety is discharged by the change in the mode of remunerating his principal. [*Alderson*, B.—It was decided in the case of *The Mayor of Berwick v. Oswald* (a), that the mere change in the tenure of the office did not discharge the sureties, inasmuch as they expressly stipulated that their liability should continue whilst the principal continued in office in consequence of that election, “or under any annual or other future election.” This case, however, is different. A person may be willing to be surety for another if the latter has a fixed salary, but not if the salary is fluctuating.] *Frank v. Edwards* (b) is an authority that a surety is not exempt from liability by a reduction in the salary of his principal, unless the bond contains a stipulation to that effect. [*Pollock*, C. B.—In this case, if the credit to the principal is enlarged, the responsibility of the surety is increased, and if the credit is contracted, the means of the principal are reduced.] In *Bamford v. Hes* (c), by the terms of the condition, the sureties were only liable for so long as the principal continued in office, and his appointment was revoked by a re-appointment at a different salary. *Holland v. Lea* (d), which may be referred to as in effect overruling *Frank v. Edwards*, proceeded on the ground that, by the 59 Geo. 3, c. 12, s. 7, the justices could only appoint an assistant overseer with those specified duties and that fixed salary which the vestry had annexed to the office, and the bond was not given on such

pany had no power to carry on such trade: *The Chester Glass Company v. Dewey*, 16 Massachusetts, 94. And where a company incorporated for the purpose of fire insurance also carried on the business of a banking copartnership, it was held, that the company, having assumed and exercised powers not conferred by their act of incorporation, had

usurped a franchise; and on a quo warranto information filed by the Attorney-General, judgment of ouster was rendered against them: *The People of New York v. The Utica Insurance Company*, 15 Johnson, 358.

(a) 1 E. & B. 295.

(b) 8 Exch. 214.

(c) 3 Exch. 380.

(d) 9 Exch. 430.

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an appointment. In *Parker v. Wise* (a) the bond was conditioned for payment of a sum then due, and also of such further sums as the obligees might thereafter advance, not exceeding in the whole 5000*l*, and it was held that the bond was not avoided as against the surety by reason of advances beyond that amount, there being no stipulation to that effect.

Manisty appeared to argue for the defendants, but was not called upon.

ALDERSON, B.—The reasonable construction of this bond is, that the sureties undertook to be responsible for the faithful conduct of their principal whilst he continued “such coal agent,” that is, a coal agent at a yearly salary of 100*l*. But when the mode of remuneration was altered the agency was different, and the risk of the sureties was materially increased. The case finds, that in point of fact the change was profitable to the principal; but it might have proved unprofitable, and that risk the sureties never undertook. With respect to the first objection, there is no doubt whatever.

PLATT, B.—The obligation which the sureties entered into was in respect of an agency at a certain salary, and that is changed into an uncertain salary. The condition recites, that the company have agreed to appoint the principal as their agent “at a yearly salary of 100*l*.” Therefore, there was a bargain between the company and the sureties that the agent should have that salary. That circumstance distinguishes this case from *Frank v. Edwards*, for there, as observed by my Brother *Parke* in the course of the argument, the condition did not contain any stipulation that the appointment should be continued at the same salary.

(a) 6 M. & Selw. 239.

MARTIN, B.—I am clearly of opinion that the defendant is not responsible. The case of *Lord Arlington v. Merriote* (a) decided that, for the purpose of ascertaining the responsibility of a surety, the recital in the bond must be looked at as part of the contract. Here the recital is, that the company have agreed to appoint the principal as their agent at a yearly salary of 100*l*. Therefore it seems to me that the bargain between the parties was, that the sureties should be responsible during the continuance of such agency, that is, an agency at the salary of 100*l* per annum. An agency at a different salary altered the relation between the principal and sureties in respect of which the latter agreed to become bound, and consequently they are not responsible. I should observe, that the opinion which I now express is quite consistent with my judgment in *Holland v. Lea*.

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POLLOCK, C. B.—I am entirely of the same opinion.

Judgment for the defendant (b).

(a) 2*Saund.* 411 a.

(b) See *Evans v. Erle*, ante, p. 1.

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ATTORNEY-GENERAL *v.* RADLOFF.

On the trial of an information filed by the Attorney-General for the recovery of penalties for smuggling, under the 46th and 82nd sects. of the 8 & 9 Vict. c. 87, the defendant was tendered as a witness on his own behalf, and rejected:—*Pollock*, C. B., and *Parks*, B., held, that the defendant was not rendered a competent witness by 14 & 15 Vict. c. 99, and therefore that he was properly rejected. *Platt*, B., and *Martin*, B., contra.

THIS was an information filed by the Attorney-General against the defendant for a breach of the Customs laws. The first count of the information alleged, that the defendant, after the 4th of August, 1845, &c., to wit, on the 16th of September, 1852, did assist and was otherwise concerned in the unshipping of certain foreign goods, to wit, 3122 pounds weight of foreign tobacco stalk flour, of the value of &c., the said goods being prohibited to be imported into the United Kingdom, contrary to the form of the statute &c. The second count alleged, that the defendant, after the 1st of August, 1849, to wit, on the 16th of September, 1852, was concerned in importing and bringing into the United Kingdom certain other foreign goods which were then and there, under and by virtue of an Act of Parliament passed in the 8 & 9 Vict., intituled "An Act for the general Regulation of the Customs," prohibited to be imported into the United Kingdom, that is to say, divers, to wit 3291 pounds weight of other foreign tobacco stalk flour, of great value, to wit, &c.; contrary

adjudged to her said Majesty, and that the said O. Radloff may appear here in Court to answer concerning the said several offences, and also concerning the said several sums of money."—The defendant pleaded not guilty, upon which issue was joined.

At the trial before the Lord Chief Baron, at the Middlesex Sittings after last Hilary Term, the defendant's counsel proposed to call the defendant himself as a witness in support of the defence. This was objected to on the part of the Crown, and the Lord Chief Baron allowed the objection.

Shee, Serjt., obtained a rule nisi for a new trial in last Easter Term, on the ground that the defendant was improperly rejected.

The *Attorney-General*, *Watson*, and *Wilde* shewed cause (May 10).—The question turns upon the 2nd and 3rd sections of the 14 & 15 Vict. c. 99. The 2nd section enacts that, "on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any Court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence either vivâ voce or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding," The 3rd section is as follows: "But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any

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person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband." The first of these two sections, which is the enabling section, does not include this case, and the latter clause, which qualifies the former and comes by way of proviso, contains two exceptions, within both of which this case falls. Taking the latter clause first,—this proceeding against the defendant is "a criminal" suit and not a civil proceeding. The broad distinction appears to be this: where the proceeding is conducted with the view and for the purpose of obtaining redress for the violation of a private right only, the proceeding is a civil one; but on the other hand, where the proceeding is directed for the punishment of an offence which militates against the general interests of the community at large, and is for the punishment of an infraction of some public duty, such proceeding is a criminal proceeding. This charge is in respect of an *offence* against the Customs laws. By those laws that offence is prohibited absolutely, and certain fines are imposed upon the offenders. By the 105th section of the 8 & 9 Vict. c. 87, persons having been before convicted of an offence against the Customs, may, upon a verdict passing against them, be imprisoned in the House of Correction. If this be a "criminal" proceeding, the defendant was clearly not admissible as a witness. At all events it is an offence punishable by summary conviction. But the 82nd section of the same Act (8 & 9 Vict. c. 87) enacts, that "all penalties and forfeitures incurred or imposed by this or any Act relating to the Customs &c., shall and may be sued for, prosecuted, and recovered by action of debt, bill, plaint, or information in any of her Majesty's Courts of record at Westminster or at Dublin &c., in the name of her Majesty's Attorney-General &c., or by information before any

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two or more of her Majesty's justices of the peace in the United Kingdom &c.;" and by the 63rd section of the 8 & 9 Vict. c. 86, which is also one of the Customs Acts, which together form a code, the importation of the article which the defendant is charged with having imported is absolutely prohibited; so that the Crown might have proceeded against the defendant for the breach of the law by indictment instead of by information. The 46th section of the 8 & 9 Vict. c. 87, which imposes a penalty upon the commission of the offence, does not exclude the proceeding by way of indictment. The remedy expressly given by the statutes is purely cumulative. [*Parke, B.*—I think it can hardly be contended that the importation of goods prohibited by statute under pain of a penalty and of forfeiture is a misdemeanor punishable by indictment.] In 1 Russell on Crimes, by Greaves, p. 49, it is laid down that, "where an offence is not so at common law, but made an offence by Act of Parliament, an indictment will lie where there is a substantive prohibitory clause in such statute, though there be afterwards a particular provision and a particular remedy given." And Blackstone, in speaking of the nature of crimes, says: "a crime or misdemeanor is an act committed or omitted in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms, though in common usage the word 'crimes' is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors' only" (a). It could not have been the intention of the Legislature to make a party compellable to give his testimony, except in those cases where he is also a competent witness. This consideration raises a ques-

(a) 4 Black. Comm. p. 5.

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tion upon the second branch of the 3rd section, which expressly provides, that nothing in the Act shall "render any person compellable to answer any question tending to criminate himself." Here the defendant might refuse to answer any question having that tendency, and even the presiding Judge would interfere if such a question were put to a witness. On a trial for a charge of murder before *Tindal*, C. J., at Durham, a witness was asked whether he himself did not hold up a knife? But the learned Judge told the witness that he ought not to answer that question, upon the ground that the answer would criminate the witness. [*Parke*, B.—I think that a witness ought to make the objection himself, although I believe, in *Lord Cardigan's case*, Lord *Denman*, C. J., interfered to prevent a witness from answering a question having that tendency.] The maxim, *nemo tenetur seipsum accusare*, expresses a well-established principle of English law. Witnesses have ever been protected from answering questions that will criminate them; and it has been held, that the term "criminate" applies as well to offences punishable by penalty as to indictable offences. This maxim is kept alive by the express provision and declaration in the 3rd section. In *Sir J. Friend's case*, Lord Chief Justice *Treby* laid it down, that no one is bound to answer any question which will lay him open to a penalty (a). By the 46 Geo. 3, c. 37, which was passed to remove doubts which existed on this subject, it was declared, that a witness cannot by law refuse to answer a question relevant to the matter in issue, "the answering of which has no tendency to accuse himself, or to expose him to any penalty or forfeiture." The question, therefore, is, whether this statute, in the case of a proceeding by the

(a) 13 How. St. Tr. p. 17: to make him accuse himself, or
 "L. C. J.—No man is bound to subject him to any penalties."
 answer any question that tends

Crown for penalties, makes a defendant compellable to answer questions, the tendency of which would be to criminate the defendant by establishing the entire case against him. The defendant has to shew that this case is brought within the statute, for independently of it he is clearly inadmissible as a witness. If a defendant were admissible, and compellable to answer any question, he might be asked in a direct form the sole question in issue, aye or no, whether he had committed the offence with which he is charged. This would no doubt be of advantage to the Crown in most cases; for if a witness is competent, he ought to be compellable to answer all questions relevant to the issue.

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In the next place, the case does not fall within the provisions of the 2nd section. That section applies wholly to *civil* proceedings. This information and proceeding is not of that character. The form of the proclamation used at the trial, though of itself a trifling matter, may be adduced to shew the nature of the proceeding. The clerk thereby calls upon the public to inform the Lord Chief Baron of other offences committed by the defendant. This proclamation is similar to that in use on the trial of prisoners on charges of felony and misdemeanor, and is one that is not used on the trial of civil actions. In *The Attorney-General v. Freer* (a) the defendant's counsel said, "that these informations were in the nature of criminal proceedings appeared from proclamation being made in respect of them as in criminal cases;" and they observed, that "they are by the 46 Geo. 3, c. 37, expressly distinguished from *civil* suits at the instance of the King." And *Graham, B.*, said, "I think that the Attorney-General is perfectly right when he says, that these proceedings for penalties here are, although partly of a criminal nature, for many purposes to be considered as in the nature of

(a) 11 Price, 190.

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civil actions." In *The Attorney-General v. Kenifick* (a) the question was, whether an offence by the illegal unshipping of certain goods in Ireland could be prosecuted in this country; and it was held that it could not. If the proceeding had been in the nature of an action of debt, it might have been prosecuted in this country, notwithstanding the cause of action arose abroad. The case of *The Attorney-General v. Weeks* (b) may also be cited to shew that a proceeding upon a devenerunt is in its nature a criminal matter. [*Martin, B.*—Would a *qui tam* action for the recovery of a penalty be within the 2nd section?] The present case is a stronger one in favour of the inadmissibility of the witness; for here there are not any parties to the proceeding, as there are in a *qui tam* action. There are no "*parties* to the suit." The admissions of the Attorney-General would not be evidence. The form of the information, which is according to precedent, terms this an "offence." And as an additional argument, the Crown is not named in the Act, and consequently is not bound by it.

Shee, Serjt., Best, and M'Niven, in support of the rule.—This is not a criminal proceeding within the meaning of the 3rd section of the 14 & 15 Vict. c. 99. If the former part of the 1st section of the 6 & 7 Vict. c. 85, had not been qualified by the proviso, it would have rendered a defendant a competent witness in all cases. Then the 14 & 15 Vict. c. 99, s. 1, repeals that proviso; and if it had stood there, the combined effect of those two enactments would have been to render the defendant in this case a competent witness. The proviso uses the words "action or proceeding," which means any proceeding civil or criminal. On reference to the 8 & 9 Vict. c. 86, s. 63, and 8 & 9 Vict. c. 87, ss. 46, 51, 82, 88, 103, 105, 107, it

(a) 2 M. & W. 715.

(b) Bunb. 223.

will clearly appear that this is not an *indictable* offence within the meaning of the 3rd section of the 14 & 15 Vict. c. 99. It is said, however, that it is an offence punishable on summary conviction; but it does not therefore follow that it is necessarily a criminal proceeding. The other side would read the 3rd section of the 14 & 15 Vict. c. 99, thus:—"nothing herein contained shall render any person charged with an offence punishable on summary conviction competent;" but the words "who in any criminal proceeding is charged" override the whole sentence. The mere circumstance of the Legislature having authorised two justices to inflict a penalty for the offence, does not change its nature from that of a civil into a criminal proceeding. A justice has jurisdiction in case of assault, but that is not a criminal offence. In modern times there are many instances of justices being invested with jurisdiction over offences which are not criminal, as under the Companies Clauses, Lands Clauses, and Railways Clauses Consolidation Acts, 8 & 9 Vict. cc. 16, 18, 20; also under the 6 & 7 Will. 4, c. 76, for publishing a newspaper without making the declaration required by that Act. In the case of *The Attorney-General v. Freer* (a), *Graham*, B., observes, "that these proceedings for penalties here are, although partly of a criminal nature, for many purposes to be considered as in the nature of civil actions; they bear in many respects an analogy to the common cases of trespass." And in *Cawthorne v. Campbell* (b), *Eyre*, C. B., says, "An information for the duties is nothing more than the King's action of debt." There are passages to the same effect in *Manning's Exch. Prac.* 193, note (g), 201, 231; *Bateman's Excise Law*, 59, note; *Steph. Comm.* Vol. 4, 73, 3rd ed.; and *Tomlin's Law Dict.* "Information." An information for a penalty has all the incidents of a

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(a) 11 Price 183.

(b) 1 Anst. 214.

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civil, but none of a criminal proceeding. It is filed in this Court, which has no criminal jurisdiction; a count for the penalty may be joined with a count on an account stated: *Attorney-General v. Bradbury*(a); the defendant cannot call witnesses to character: *Attorney-General v. Bowman*(b); Russell on Crimes, by Greaves, Vol. 1, 49, Vol. 2, 784; a new trial may be granted; a bill of exceptions will lie: *Rex v. Inhabitants of Preston-on-the-Hill*(c); and formerly a bill might have been filed on the equity side of this Court: *Attorney-General v. Bovet*(d). *Attorney-General v. Weeks*(e) is also an authority that an information in debt is a civil proceeding. An appeal of felony was a civil proceeding: *Ashford v. Thornton*(f); and if it had not been abolished, the appellee would now have been a competent witness. An information of intrusion upon lands of the Crown is not a criminal proceeding; and though the ordinary course is to take an account of the mesne profits, yet the Crown may waive that right and impose a fine: *Attorney-General v. Levy*(g). The Legislature, in giving justices a summary jurisdiction by the 8 & 9 Vict. c. 87, no doubt had in view the ancient practice of this Court in imposing fines. If, instead of this information, the Crown had summoned the defendant before two justices, and he had tendered himself as a witness, it would have been objected that he could not be heard, inasmuch as that was a criminal proceeding; then, if he had offered to call witnesses to character, it would have been said that he could not do so, because it was a civil proceeding. The supposed difficulty in construing the statute arises from not adverting to the distinction between the *competency* of a witness, and

(a) 7 Exch. 97.

(b) 2 Bos. & P. 532, note.

(c) Cas. temp. Hard. 251.

(d) 15 M. & W. 60.

(e) Bunb. 223.

(f) 1 B. & Ald. 405.

(g) Exch. June, 1840. Not reported.

the *privilege* of a witness in not answering certain questions. The 14 & 15 Vict. c. 99, renders the parties to a suit competent to give evidence in all cases, except where, in criminal proceedings, they are charged with an indictable offence, or an offence punishable on summary conviction; but, whether the proceeding be criminal or civil, they are not to be compellable to answer any question tending to criminate themselves. In that part of the clause the words "in any criminal proceeding" are omitted, and again introduced in the following part, the object being to preserve the ancient rule of law, "*nemo tenetur seipsum prodere*:" *Burrowes v. The High Commission Court* (a). The 46 Geo. 3, c. 37, was declaratory of the common law, that a witness "cannot refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever," by reason only that the answering such question may establish that he owes a debt. The practice in equity is founded on the common law as declared by that statute; and therefore an heir-at-law is not obliged to answer interrogatories as to the testator's sanity, where there is a clause in the will revoking an annuity in the event of the heir disputing his will, or his competency to make it: *Cooke v. Turner* (b), Mitford's Chan. Plead. p. 359 note, 5th edit. That does not come within the principle that the answer has a tendency to criminate the witness, or to disclose his title, but merely that it would subject him to the loss of a civil right. If a female claimed dower in gavelkind, she would not be compellable to answer whether she was married a second time; but nevertheless she would be a competent witness. The argument, that the 14 & 15 Vict. c. 99, does not apply to cases where there is no reciprocity, proves too much; for if it were so, the statute would not apply to

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(a) 3 Bulst. 50.

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any case in which the Crown was a party; but in quare impedit the defendant may be called as a witness, although the Crown cannot. [*Parke, B.*—It is clear that the Sovereign cannot be a witness, because there is no means of compelling her attendance.] It was further argued, that the Crown, not being expressly named, was not bound by the provisions of the 14 & 15 Vict. c. 99; but as regards criminal proceedings the Crown is clearly included. The rule, however, is by no means universal. Where an Act of Parliament is expressly made for the preservation of public rights and suppression of public wrongs, and does not interfere with the established rights of the Crown, it is said to be binding as well upon the king as upon the subject; and likewise, the king may take the benefit of any particular Act, though he be not especially named: *Black. Comm.* vol. 1, p. 262; *Magdalen College case*(a). [*Pollock, C. B.*—The Crown is not bound with reference to matters affecting its property or person, but is bound with respect to the practice in the administration of justice.]

Watson, in reply, referred to the 5 & 6 Will. 4, c. 50, s. 100, and *Regina v. Garbett*(b).

Cur. adv. vult.

The learned Judges, differing in opinion, delivered their judgments seriatim.

MARTIN, B.—This is an information for the recovery of penalties for smuggling tobacco, under the 46th and 82nd sections of stat. 8 & 9 Vict. c. 87. The case was tried before the Lord Chief Baron at the Sittings after last Hilary Term, when the defendant was tendered as a wit-

(a) 11 Rep. 72 a.

(b) 2 Car. & K. 474.

ness on his own behalf, and was rejected by the learned Judge. A rule for a new trial was granted on the point, and the case has been argued before us. The question depends upon the construction of the 2nd and part of the 3rd sections of stat. 14 & 15 Vict. c. 99.

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The 2nd section enacts that, "on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any Court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding." A very long argument was addressed to us, to shew that the present case does not fall within this section. I believe, however, we are all clearly of opinion that it does. For my own part, I cannot conceive what general words the Legislature could have used to include the present case if these do not. "Any suit, action, or other proceeding in any Court of justice" must surely include an information at the suit of the Attorney-General for penalties under the 82nd section of the Act first named.

The 3rd section contains the exception, and provides, that nothing in the Act shall "render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself, or shall render any person compellable to answer any question tending to criminate himself" By the 82nd section above mentioned, the penalties sought to be recovered in the present information are recoverable by action of debt, bill, plaint, or information,

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in the name of the Attorney-General, or of some officer or officers of the Customs, or by information before two justices of the peace; they are therefore recoverable on a summary conviction. That the breach of law charged in the information is not an indictable offence is clear—the same section of the statute which enacts the offence enacts the penalty as the consequence, and in such cases it is by law the only consequence, and the offence is not the subject of an indictment: *Couch v. Steel* (a).

But it was argued that this is a criminal proceeding, wherein the defendant is charged with an offence punishable on summary conviction; and we are all agreed that the only question is, whether the information in the present case is a criminal proceeding within the true meaning of the 3rd section. I think it is not. There are many *crimes*, properly so called, which are liable to be punished on summary conviction. But there are a vast number of *acts* which in no sense are *crimes*, which are also so punishable; such, for instance, as keeping open public houses after certain hours, and a variety of breaches of police regulations which will readily occur to the mind of any one. The bringing tobacco into this kingdom is of itself a perfectly innocent act; but the requirements of the public revenue, which induce the Legislature to impose a very high duty upon the article, probably render it matter of necessity that the bringing it into the kingdom without payment of the duty should be subjected to a penalty. But this cannot affect or alter the intrinsic and essential nature of the act itself, and it seems to me that it cannot be denominated a “crime,” according to the ordinary and common usage of language, and the understanding of mankind. The proper meaning of “crime” is an indictable offence. The question has frequently arisen, whether an information at the suit of the Attorney-General for pe-

(a) 3 E. & B. 402.

alties for smuggling is a criminal proceeding. I believe it has invariably been considered not to be so. One test, and a very obvious one, is, whether in such a case the character of the defendant be admissible in evidence. It has been decided that it is not. In criminal cases evidence of the good character of the accused is most properly and with good reason admissible in evidence, because there is a fair and just presumption that a person of good character would not commit a crime; but in civil cases such evidence is with equal good reason not admitted, because no presumption would fairly arise, in the very great proportion of such cases, from the good character of the defendant, that he did not commit the breach of contract or of civil duty alleged against him. But it is not admissible in such cases as the present; and the reason given is (as indeed it must be), that the proceeding is not a criminal proceeding, but in the nature of a civil one, and that therefore the good character of the defendant would afford no just ground of presumption that he had not done the act in respect of which the penalty is imposed. It therefore seems to me that the true construction of the 3rd section is, that when the act in respect of which the summary conviction is sought to be obtained is really a crime, the accused person is neither competent nor compellable to give evidence either for or against himself, but that when the act is not of a criminal nature he is so competent, and may lawfully be examined.

The judgment which has been arrived at by the Lord Chief Baron and Baron *Parke* seems to me to put the admissibility or non-admissibility of the defendant upon a very unsatisfactory ground; that is to say, not upon the nature of the proceeding itself, but upon the collateral and apparently not very relevant circumstance, whether the act charged in the information could also be the subject of a summary conviction. I cannot think that it was intended by the legislature to make this the test of the

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admissibility. But there seems to me to be a still stronger objection to the conclusion which they have arrived at. By the 82nd section of the 8 & 9 Vict. c. 87, these penalties are recoverable by an action of debt. Now that is clearly not a criminal proceeding, and if the Attorney-General sued in debt the defendant would undoubtedly be admissible; and can it be that in a legal proceeding to recover the same penalty, the right of the defendant to be examined as a witness on his own behalf is to depend upon whether the Attorney-General thinks fit to adopt the action of debt or the information—the power to use either at his option being given to him by the same section of the Act of Parliament? In my judgment the defendant's right cannot be affected by the form of proceeding which the Attorney-General thinks proper to use.

A variety of reasons were submitted to us to shew why the defendant should not have been rendered admissible by the Legislature. Several of them seem to me not to be well founded. It was said, that there was no reciprocity, and that the admission of the defendant to be a witness would be one-sided. But this is not so. It would be perfectly idle to suppose that the Attorney-General himself could know anything which would be evidence in such a case, and in reality all persons whatever who know anything of the transaction are admissible as witnesses against the defendant. It was also said that, if the Attorney-General called the defendant as a witness, he might refuse to answer any question whatever. This is quite true: but supposing him to be called and refuse to answer, there can be no doubt that, if there was the slightest evidence in the case, the practical consequence would be that this his refusal would lead to an immediate verdict against him. It was also said that it would be dangerous to admit him to be examined, on the ground of the temptation to commit perjury. But this proves too much, for there is no greater temptation of this kind in the case of an informa-

tion at the suit of the Attorney-General than in numerous other classes of cases in which defendants are undoubtedly admissible.

On the whole, I am of opinion that an information at the suit of the Attorney-General for penalties for smuggling under the stat. 8 & 9 Vict. c. 87, is not a criminal proceeding, and that the true construction of the 3rd section of the 14 & 15 Vict. c. 99, (upon which the question entirely depends), is to exclude defendants as witnesses in direct proceedings for a summary conviction when the act charged is a crime. This, I have been informed, is the construction which has been put upon the section by several of the very learned persons who preside at the metropolitan police courts, and in my judgment it is the correct one.

The rule ought therefore to be made absolute.

PLATT, B.—This was an information by the Attorney-General to recover penalties for smuggling tobacco, and upon the trial the defendant's counsel proposed to call the defendant himself as a witness. The question arose whether he was competent, under the 14 & 15 Vict. c. 99. The matter has been argued at considerable length; and now that the judgment of the Court is to be pronounced upon it, I am sorry to say we are divided in opinion.

The Acts of Parliament which give rise to this question, the 6 & 7 Vict. c. 85, and the 14 & 15 Vict. c. 99, were manifestly passed for the purpose of remedying what was considered an evil, or an obstruction to the administration of justice, by raising objections to persons offered as witnesses. The first Act on this subject was the 6 & 7 Vict. c. 85, the preamble of which shews the object which the Legislature had in view: "Whereas the inquiry after truth in Courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, *both in criminal*

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and civil cases, should be laid before the persons who are appointed to decide upon them, &c." Then, having stated that as the evil to be remedied, (for we must not forget that both these Acts are remedial Acts, and therefore ought to be construed in such manner as to advance the remedy as much as possible), the Act goes on to enact,— "That no person offered as a witness shall be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, *civil or criminal*, in any Court or before any Judge, &c." Now, if the enactment had stood without the subsequent proviso, who could doubt that any person, even one who was indicted for a crime, might be examined as a witness?—at all events the expressions would include the parties to a cause, as well as those who had a direct interest in the result. But the Legislature by the subsequent proviso has excepted from the enacting part the parties to the suit, and those who stand in the place of parties, such as lessors of plaintiff, landlords who are defending by their tenants, in short, all persons having a direct beneficial interest in the event of the suit. The alteration in the law was found to operate beneficially; because, although it undoubtedly promoted the commission of the crime of perjury, yet it certainly on many occasions afforded the means of discovering the truth. Then came the 14 & 15 Vict. c. 99, which, after reciting that it is expedient to amend the law of evidence in divers particulars, begins by striking out a great portion of the proviso to which I have referred, and says, that "so much of section 1 of the Act 6 & 7 of her present Majesty, c. 85, as provides that the said Act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenants of the premises sought to be re-

covered in ejectment," and so forth, shall be repealed. Therefore, the enacting part of the former Act is enlarged, the proviso having been repealed by this Act. The 2nd section of this Act enacts, that "on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any Court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence." Therefore, all parties in a civil suit are "competent and compellable to give evidence." Then comes the 3rd section, which raises the question before the Court:—"But nothing herein contained shall render any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself."

It was urged that this information was a criminal proceeding, or, at all events, that it was a proceeding for an offence punishable on summary conviction. Now let us see what the cause of this proceeding was; because every information by the Attorney-General is not a criminal proceeding. He may proceed by way of information, and, in fact, prosecute a claim against a defendant in trover, in debt, in ejectment, in short, in every other species of action. This information is merely an action for the purpose of recovering penalties. What then is a "civil proceeding" as contradistinguished from a "criminal proceeding?" It seems to me that the true test is this, if the subject matter be of a personal character, that is, if either money or goods are sought to be recovered by

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means of the proceeding—that is a civil proceeding; but, if the proceeding is one which may affect the defendant at once, by the imprisonment of his body, in the event of a verdict of guilty, so that he is liable as a public offender—that I consider a criminal proceeding. Undoubtedly, informations by the Attorney-General for smuggling have not been deemed criminal proceedings, but rather in the nature of civil proceedings, precisely like the old actions for recovering penalties under the Game Laws, which were civil actions. Now let us see what is the object of this information. Is it for the purpose of, immediately on conviction, taking the body, and punishing for the offence the party who is found guilty? No; the object is to recover money—to recover that which by the law is made a debt; for, by the 82nd section of the 8 & 9 Vict. c. 87, (the Act under which the penalty was sought to be recovered), there is this enactment:—“And be it enacted, that all penalties and forfeitures incurred or imposed by this or any Act relating to the Customs, or to trade or navigation, shall and may be sued for, prosecuted, and recovered by action of debt, bill, plaint, or information in any of her Majesty’s Courts of record.” Then the statute goes on to provide that the penalty may be recovered by summary conviction. Would any lawyer contend for a moment that this action of debt would be a criminal proceeding? And yet here is the same person, who may be assailed in an action of debt, in which case he would be a competent witness under this Act of Parliament, but, if an information is filed, he is not competent. Nothing can be more absurd. It seems to me, I own, that this is not a criminal proceeding. Then, if it is not a criminal proceeding, let us look further at the 3rd section of the Act of Parliament; and undoubtedly, the words “who in any criminal proceeding” govern the whole, with the exception of that part which provides that nothing in the statute shall render any person com-

pellable to criminate himself; so that the section must be read thus:—"any person who in *any criminal proceeding* is charged with any offence punishable on summary conviction." Therefore, the offence charged, in which the party is not competent or compellable to give evidence, must be a criminal proceeding. It seems to me that this is not a criminal proceeding, or anything approaching to the nature of that proceeding; and consequently I think this defendant was entitled, under the Act of Parliament, to present himself before a jury for the purpose of being examined. Suppose a person was indicted for an assault, he could not be a witness in his own case, because that is a criminal proceeding, and on conviction he might be imprisoned immediately. But if an action is brought against him for an assault, will any one contend for a moment that he is not a witness according to the terms of this Act of Parliament? Whether or no the Legislature intended that the Act should have this effect, is not for us to consider; since its language plainly says that the party shall be competent and compellable to give evidence, I think we must hold the law to be such as the Legislature declares. If that is incorrect, nothing can be more easy than to pass an Act of Parliament for the purpose of amending it, or preventing any misapplication of the law as it now is. I, therefore, think this rule ought to be made absolute.

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PARKE, B.—In this case, on the trial of an information filed by the Attorney-General for the recovery of the treble value of some smuggled tobacco, the defendant was offered as a witness on his own behalf, and rejected by the Lord Chief Baron.

A motion for a new trial was made last Term, and argued on the last two days of the Term, and time was taken to consider the question, which is of importance and some difficulty. The difficulty, not an uncommon one, is, to

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ascertain the meaning of the words used by the Legislature. Probably the framers of the Act never had the particular class of cases—informations for penalties or actions for them—in their contemplation. We must follow, however, the ordinary rules of construction of the language used by the Legislature, and, so doing, it seems to me that they have used sufficient words to prohibit the defendant from being a witness; and therefore I think the decision of the Lord Chief Baron, though I have had considerable doubt about it, was right.

By the Act 14 & 15 Vict. c. 99, upon which this question depends, it is provided by sect. 1, that the proviso in the 6 & 7 Vict. c. 85, s. 1, that no nominal or real party to a suit, action, or proceeding shall be competent, is repealed; and then, by the 2nd section it is enacted, that on the trial of any issue joined, or of any matter or question or on any inquiry arising in any suit, action, or other proceeding in any Court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the parties thereto, &c. shall, except as thereafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding. The exceptions are stated in the 3rd and following sections. The 3rd provides, that nothing therein contained shall render any person who in *any criminal proceeding* is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. The

4th section provides, that the statute shall not apply to actions or proceedings in consequence of adultery or breach of promise of marriage. The 5th provides, that nothing in the Act contained shall repeal any provision in the 7 Will 4 & 1 Vict. c. 26.

The question is as to the meaning of the 2nd and 3rd sections.

The words of the 2nd section are certainly large enough to include every proceeding of every description in which witnesses could be examined—every proceeding, criminal or civil, or other, if there be any, which does not fall accurately within the description of criminal or civil; and unless this case is comprised within the subsequent exceptions, parties to suits and proceedings of every description, civil or criminal, are competent and compellable to give evidence for and against each other.

Then comes the question as to the meaning of the exception in the 3rd section, the only one applicable to this case. Now the first part of this exception embraces all criminal proceedings for indictable offences, proceedings by indictment, informations by the Attorney-General, informations in the Crown-office, coroners' inquisitions, preliminary inquiries on charges of felonies or misdemeanors before magistrates, and every other mode by which indictable offences may be inquired into or tried. This certainly does not apply to this sort of information by the Attorney-General, for this offence is *not indictable*. Next, is this a *criminal* proceeding, by which the defendant is *charged* with the commission of any offence punishable by *summary conviction*? As to its being a *criminal* proceeding: an information by the Attorney-General for an offence against the revenue laws is a criminal proceeding—it is a proceeding instituted by the Crown for the punishment of a crime—for it is a crime and an injury to the public to disobey statute revenue law; and accordingly the old form of proclamation, made before the trial of informa-

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tions for such offences, styles these offences "misdemeanors." Is it a proceeding whereby he is charged with the commission of an offence punishable by a summary conviction? One should conjecture that the intention was to provide for proceedings before a magistrate, or commissioner, or other person having a power to convict summarily for an offence, in which proceeding he was charged with a view to a conviction for that offence. But the words are not so limited; they are large enough to embrace any criminal proceeding, whether summary or not, for any offence which might have been the subject of inquiry and conviction in a summary proceeding; and if so, the defendant was incompetent to be examined, for no sufficient reason can be assigned for making a party incompetent and not compellable to be a witness in a proceeding before a magistrate, and yet competent and compellable on a trial for the very same offence before a judge and jury. I am therefore of opinion that, in this particular case, the witness was incompetent, and was therefore properly rejected.

But the Legislature have not provided for the case of an information filed by the Attorney-General for an offence against the revenue laws, which was neither indictable nor the subject of a summary proceeding before a magistrate or other person. This is a *casus omissus* from the exception, whether accidental or designed we need not inquire, and falls within the general provision of the 2nd section. In like manner are omitted the cases of civil remedies for penalties or forfeitures, where parties are compellable and competent to give evidence; for it is no objection to their being so, that, when called, any one has the privilege of refusing to answer any questions tending to criminate himself; and it is said that as every material question would have that tendency, and every immaterial one might be rejected, the result would be that he would not be bound to answer at all. But still he is compellable

to attend and be sworn as a witness, and whether he actually gives evidence or not depends upon his taking the objection. The very act, however, of refusing to answer when called would materially prejudice the defendant's case; he would stand in a very different position from that in which he is placed by a plea of not guilty. This is an evil which the Legislature have not provided for, but it is not probable that it would often occur, as few plaintiffs would try the experiment of calling the defendant in a penal action. On the other hand, the defendant in all those cases not provided for by the statute may be examined for himself, and yet not be compelled on cross-examination to answer any question tending to render him liable to the information or action; but then, if he did so, his evidence would very likely not profit him at all, and the power of being examined on his own behalf would be of little avail.

All that is necessary, however, to decide in this case is, that the information, being for an offence punishable on summary conviction, is within the exception in the 3rd section, and therefore the witness was inadmissible, and this rule ought to be discharged.

POLLOCK, C. B.—My learned Brothers who have preceded me in giving judgment, have, in my opinion, each of them correctly stated the question. I entirely agree with my Brother *Martin*, that all that we have to consider is, what is the meaning of the 3rd section of the 14 & 15 Vict. c. 99. I think it is very clear that but for that section the present defendant, and probably every other person in any Court whatever, and accused of any offence whatever, might become a witness. But the 3rd section introduces certain exceptions, and there can be no doubt a person charged by the Crown in a criminal court of justice cannot be a witness. The question now is, whether the defendant on the present occasion was properly re-

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jected as a witness. The solution of this question turns upon the following inquiries:—Is the proceeding by the Attorney-General upon this information a criminal proceeding? Is smuggling an offence? And is it an offence punishable on summary conviction? Because, if smuggling be an offence, and an offence punishable on summary conviction, and if an information by the Attorney-General in this Court is a criminal proceeding, then the present case is precisely within the very words of the 3rd section of the 14 & 15 Vict. c. 99, as my Brother *Parke* has just pointed out, and the witness was properly rejected.

My Brother *Martin* is of opinion that this proceeding by the Attorney-General is not a criminal proceeding; and if it be so, his judgment is perfectly correct. He seems to think also that this breach of the revenue laws is not an offence. The conclusion, however, to which I have come is, that all the inquiries on which it appears to me the question depends, ought to be answered in the affirmative. In the first place, I am of opinion that the proceeding in this Court by the Attorney-General to recover penalties by an information filed by him on behalf of the Crown is a criminal proceeding. It is very true that some argument to the contrary is furnished by the refusal at the trial to receive witnesses to character; but, on the other hand, there is the proclamation which is regularly made in this Court—that is, that persons are called upon to come forward and bring any charges they can against the defendant, for that there he stands on his deliverance; and any persons who have any misdemeanors to charge him with must come forth. Now that is exclusively a form of proclamation used in criminal Courts and in criminal proceedings; and it appears to me, that the fact of its being used in this Court outweighs the argument, that an information of this kind is not a criminal proceeding because evidence to character is inadmissible. I am

therefore of opinion, that this information is a criminal proceeding. That it is a matter which may be inquired into and punished on summary conviction, is perfectly clear. The only remaining question then is—is it a criminal offence? I should be sorry if I could bring myself to entertain any doubt about it. I think it is a very grave offence against the public. I cannot distinguish, either in morals or law, between cheating the state and cheating a private individual. I cannot distinguish between endeavouring by concealment and fraud to prevent that from being paid which is necessary for the public service, and by similar concealment and fraud depriving one of her Majesty's subjects of that which is his lawful right and due. I am of opinion, therefore, that it is a criminal offence. It is very true that it is not punishable in the ordinary way by indictment; but it is punishable by fine, and the fine may be imposed on summary conviction. Therefore, this being, in my judgment, an offence punishable on summary conviction, and the question arising in a criminal proceeding, I am of opinion that the defendant was not a competent witness, and was properly rejected. But, as my Brother *Platt* is of the same opinion with my Brother *Martin*, and consequently the Court is equally divided, no judgment can be pronounced; but the rule for a new trial will drop.

Rule dropped.

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RODRIGUES v. MELHUISE and Others and JONES.

The 35th section of the Liverpool Pilot Act, 5 Geo. 4, c. lxxiii., enacts, that "in case the master or commander of any ship outward bound, except &c., shall proceed to sea, and shall refuse to take on board and employ a licensed pilot, such master &c. shall pay to the pilot who first or who only shall offer his service, and shall be so refused, according to the different rates directed by the Act to be paid, in like manner as if the pilot had been received and employed in piloting the vessel into or out of the port, together with all expenses to be incurred in the recovery of the same."

THE declaration alleged that the plaintiff, before and at the time of the committing of the grievance by the defendants, was lawfully possessed of a certain anchor boat, then lawfully being in the river Mersey; and that the defendants were also then possessed of a certain other ship or vessel in the river aforesaid, and then had the care, direction, and management of the same; yet they took so little care, and governed and navigated the same in so unskilful, negligent, careless, and improper a manner, that the same, by and through the carelessness, unskilfulness, negligence, and mismanagement of the defendants, with great force and violence ran foul of and struck against the said anchor boat, and thereby broke and damaged and injured the same, and caused the same to sink, &c.

The defendants (excepting Jones) pleaded, first, not possessed, and secondly, not guilty.

The defendant Jones pleaded, first, not guilty, and secondly, that, at the time when, &c., he was not possessed of the said ship or vessel, nor had he the care, direction or management thereof, modo et formâ. Upon these pleas issues were joined.

At the trial, before *Platt*, B., at the last Liverpool As-

A ship left the docks of Liverpool with a pilot on board on the 2nd of December. On the 3rd the plaintiff was engaged to raise an anchor of the ship which she had lost in the river; and in doing so, by some mismanagement and neglect of those on board the ship, the plaintiff's boat, which was alongside, was injured and sunk. At the time of the accident the ship was at anchor in the river Mersey, she was in the service of the Post-office, and was under contract to sail on the following day (the 4th), but the master was not on board, and the riggers were engaged in completing her rigging.—*Held*, (assuming that under the Act of Parliament an outward bound vessel when proceeding to sea is bound to take a pilot on board), that, under the circumstances, this ship was not at the time *proceeding to sea*.

If, in the case of a vessel proceeding to sea under the care of a pilot, damage is done by the mismanagement of the vessel, the owners, in order to exonerate themselves, are bound to shew that the accident was occasioned *exclusively* by the pilot's default.

sizes, it appeared that the action was brought by the plaintiff, as the owner of an anchor-boat, for an injury occasioned to his boat by the ship *Matilda Wattenbach*, whilst the plaintiff was engaged in raising that vessel's anchor, the defendants Melhuish being the owners, and the defendant Jones, a licensed pilot on board at the time. It appeared that Jones went on board on the 2nd of December, on which day he took the ship out of Princes Dock, at Liverpool, and that she was taken up the river by a steamer, and was anchored there. On the 3rd the plaintiff was engaged to raise her anchor, and in doing the work his boat was in some way swamped by the ship, and much injured; but the evidence as to the precise cause of the damage was conflicting. At the time of the accident the defendant Jones gave orders as to the management of the vessel, but the master was not then on board, and several riggers were engaged in completing the rigging of the ship, which was under a contract with the Post-office to sail on the following day.

On the part of the owners of the ship, it was contended that, under the Liverpool Pilot Act, 5 Geo. 4, c. lxxiii., the owners were bound at the time the accident happened to have a licensed pilot on board and the ship under his management, and consequently that they were not responsible. On the part of Jones it was contended that the evidence shewed that one of the owners interfered, that he was the mere servant of the owners, and that there was no such joint possession of the vessel in him with the owners as was sufficient to maintain the action.

The learned Judge overruled the last objection, but he reserved the question for the opinion of the Court, whether the owners were exempted from liability on the ground that a pilot was on board.—A verdict was found for the plaintiff.

In last Term, *Knowles*, on the part of the owners,

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obtained a rule nisi to set the verdict aside, and to enter a verdict for them; and *Cowling*, on the part of Jones, the pilot, obtained a rule nisi for a new trial on the ground of misdirection.

Edward James (Brett with him) shewed cause against the rule obtained to enter a verdict for the owners.—The owners of the vessel, in order to relieve themselves from liability in this case, must establish two propositions:—First, they must convince the Court, as a matter of law, that under the provisions of the Liverpool Pilot Act, 5 Geo. 4, c. lxxiii., they were *bound* to have a pilot on board their vessel *at the time* the accident occurred; and secondly, as a matter of fact, that the cause of the accident was attributable *solely* to the blameable conduct of the pilot. The first question will depend partly upon the construction of the Act of Parliament, and partly upon the facts. Now the plaintiff contends that, although the owners of a vessel proceeding to sea from the port of Liverpool may be liable to the payment of certain rates, yet they are not compelled to take a pilot on board. The title of this statute is “An Act for the better Regulation and Encouragement of Pilots for the conducting of Ships and Vessels into and out of the Port of Liverpool.” And the 25th section, which applies to the case of inward-bound vessels, enacts “that in case the master or commander of any ship or vessel inward-bound shall refuse to take on board and employ a pilot so to be licensed as aforesaid, who shall offer his services, except such as shall be in ballast in the coasting trade, or be under the burthen of 100 tons, such master or commander shall pay or cause to be paid to the pilot who first or who only shall offer his services as aforesaid, and shall be so refused, the full pilotage, according to the different rates and prices hereinbefore directed to be paid, as if the said pilot had been received and employed in conducting or piloting such ship or vessel into the said

port of Liverpool." And the 26th section provides, "that in case any ship or vessel shall be in want of a pilot, and none can be procured, and there shall be any pilot on board any other ship or vessel going into or coming out of the port of Liverpool, such pilot on board any other such ship or vessel may lead the way for and conduct the ship or vessel so in want of a pilot either into or out of the said port; and the master or commander of every such ship or vessel, which shall be so piloted or conducted into or out of the said port by any pilot leading the way in such other ship or vessel, shall and is hereby declared to be subject and liable to the same rates of and for pilotage as if the pilot had actually been on board of such ship or vessel, and piloted or conducted the same into and out of the said port." The 34th section enacts, "that if the owner, master, or commander of any ship or vessel shall require the attendance of a pilot licensed as aforesaid on board any ship or vessel during her riding at anchor, or being at Hoylake or in the river Mersey, such pilot shall attend such ship or vessel, and be paid for every day he shall so attend 5s. and no more; provided always, that in case such pilot shall not be employed the whole day but be dismissed in less time than a day, such pilot shall be paid 5s. for his attendance; provided also, that the pilots so to be licensed as aforesaid, who shall have the charge of any ship or vessel, shall be paid for every day of their attendance whilst in the river, except the day of going to sea with such ships or vessels as shall be outward-bound, and the day of returning from sea and the day of docking for such as shall be inward bound." Then comes the 35th section, upon which this part of the question turns. That section enacts, "that in case the master or commander of any ship or vessel *outward-bound*, except such as shall be in ballast in the coasting trade, or be under the burthen of 100 tons, for which provision is hercinbefore made, *shall proceed to sea*, and shall refuse to take on board and

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employ a pilot so to be licensed as aforesaid, such master or commander, agent, or consignee of such ship or vessel shall pay, or cause to be paid, to the pilot who first or who only shall offer his service as aforesaid and shall be so refused, the full pilotage, according to the different rates and prices hereinbefore directed to be paid, in like manner as if the said pilot had been received and employed in conducting and piloting such ship or vessel into or out of the said port of Liverpool, together with all expenses to be incurred in the recovery of the same." These sections do not make it compulsory upon the captain or master to take a pilot. The Act was passed for the encouragement of pilots, and to provide for a fund for their maintenance. The Act, therefore, gives an option to the master of taking a pilot, although the rates are to be paid at all events, whether the services of a pilot are employed or not. [*Knowles* referred to *The Montreal* (a), and *The Agricola* (b), as authorities to shew that the Act is compulsory.] The *Attorney-General v. Case* (c) is a direct authority in point, that there is no such obligation imposed by the Act of Parliament. *Carruthers v. Sydebotham* (d) is to the same effect. But assuming these clauses so to operate as to impose a payment in the nature of a penalty upon the captain or master, and therefore to require a pilot to be taken on board, it is clear upon the facts that this vessel was not ready to "proceed to sea" within the meaning of the 35th section.—She was at anchor, the riggers were employed in completing her rigging, her master was not on board, and, what is conclusive, she was a mail packet, and was not to sail till the following day. [*Parke, B.*—Might it not be contended that she was bound to have a pilot on board a reasonable or a convenient time before proceeding to sea?] That point was not argued at the trial.—He was then stopped by the Court.

(a) 17 Jur. 538.

(b) 2 W. Rob. Adm. Rep. 10.

(c) 3 Price, 302.

(d) 4 M. & Selw. 77.

Knowles and *Milward* in support of the rule.—The *Attorney-General v. Case* and *Carruthers v. Sydebotham*, which were contemporaneous decisions, cannot now be upheld to the full extent to which they go. [*Parke*, B.—Assuming the obligation to take a pilot on board to be cast upon the captain by this Act of Parliament, on the ground that the payment of the rates is in the nature of a penalty, the owners must shew that, at the time, the vessel was proceeding to sea. They must also shew that the act was exclusively that of the pilot. In *Bennet v. Moita* (a), it was held that, where a pilot is on board, an injury occasioned by negligence in the navigation of the vessel *prima facie* is attributable to the pilot, and that he and not the owner is responsible for it; but this doctrine was overruled by a case before the Privy Council, of *Hammond v. Rogers* (b). *Pollock*, C. B.—Whether the vessel was proceeding to sea is a pure question of fact. Suppose that at the time of the accident there had not been a pilot on board, and one had offered himself, would not the captain have been justified in saying that he was not then proceeding to sea, and that he should have no occasion for his services before the morrow?] The vessel had commenced her outward voyage when she left the docks. The passage from the docks to the place where she lost her anchor is the most crowded part of the river, and a place where the services of a pilot are most needed. Vessels are unable to complete their rigging until they have left the docks. The master is frequently taken on board after the vessel has commenced her voyage.—They also contended that the pilot alone was to blame.

POLLOCK, C. B.—We are all of opinion, including my Brother *Martin* (c), that that part of the rule which affects the owners ought to be discharged. The

(a) 7 Taunt. 258.

(b) 7 Moore P. C. 160.

(c) *Martin*, B., had shortly before left the Court for Chambers.

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action is against the owners and pilot of the vessel for an injury done to an anchor boat of the plaintiffs by the negligence of those on board the vessel. At the trial, evidence was given to shew that all the defendants were responsible. And the jury, having found a general verdict against all the defendants, have no doubt been of opinion that all were implicated in the misconduct of which the plaintiff complains. It was however suggested, as there was a pilot on board by compulsion, that, according to the authority of *Bennet v. Moita*, the owners were not responsible, and were entitled to have the verdict entered in their favour. That decision, however, has to a certain extent been modified: for it has since been laid down, that the presence of a pilot on board a vessel by compulsion does not *prima facie* exonerate the owners from the responsibility of an act of negligence in the management of the vessel, but that they are bound to shew that the act of negligence was exclusively that of the pilot. However, before that question can arise, it must be established that, under the circumstances of the case, and according to the provisions of this Act of Parliament, the vessel was under the obligation of having a pilot on board at the time of the accident. It was argued on the part of the owners, that the Act makes the taking of a pilot obligatory. It might have been better, and the provisions of the Act would have been more symmetrical (if I may be allowed the expression), if the duties of the pilot and of the owners in the case of a vessel going outwards had been correlative with those of a vessel inward bound. It is likely to be a more difficult undertaking to take a vessel out of dock and into the river than taking her out to sea. But we do not sit to make the law, but to declare it as we find it. It is perhaps to be regretted that so important a matter as is the pilotage of the port of Liverpool, which is so largely connected with the commercial undertakings and maritime prosperity of this

kingdom, should have been made the subject of a local Act of Parliament only, and not that of a general Act, and therefore forming part of the law of the land. We have been directed to two sets of sections, those having reference to vessels coming into port, and those affecting vessels outward bound. Now the 35th section is as follows: [His Lordship read it and proceeded:] The question is, whether this vessel was proceeding to sea within the meaning of this clause. It was contended by one of the learned counsel on the part of the owners that, if a pilot were taken on board a vessel previous to her leaving the dock, whilst she was in the act of quitting it with the intention of going to sea, no step being necessary except the different operations requisite for her to go on, the vessel in such case would be said to be proceeding to sea. If this vessel had had all her cargo on board, and the master had been ready to get on board, and she had had everything ready to commence her voyage forthwith, and had left her berth with that intention, it might, no doubt, have been said that she was proceeding to sea from the time she first left her berth. But this vessel was not in that condition, for her rigging was not complete when the misfortune occurred; and her day for sailing was not till the 4th, she being in the service of the Post-office, and having to wait for the mails. Under these circumstances it appears to me that she was not ready to proceed to sea, and that she might have refused to take a pilot on board whilst she was thus in the river, as she was under no obligation whatever to take one at that time. And the owners are bound to make out that they are exonerated, by shewing that they were under the compulsion of having a pilot on board at the time. Looking, therefore, at the words of the Act and the facts of the case, I am of opinion that the vessel was not proceeding to sea within the meaning of the 35th section, and therefore that the defendants, who are the owners, are not exonerated.

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PARKE, B.—My Lord Chief Baron has so fully expressed the view which I entertain upon this question, that I scarcely need add a word to what he has said. The defendants *prima facie* are liable for the consequences of this accident, and therefore they must in the first place shew that they were compelled to have a pilot on board. This they have not done, which puts an end to the case. They would have been also bound to shew that the act was exclusively the pilot's. The fact of a pilot being on board would not of itself have exonerated the owners. In this respect the case of *Bennet v. Moita* must be considered as overruled by the case in the Privy Council of *Hammond v. Rogers*. The Act of Parliament is very obscure, which is much to be regretted.

PLATT, B.—I am of the same opinion. The difference between the provisions respecting incoming and outgoing vessels may be explained by the fact that incoming vessels may be navigated by foreigners, who may not be acquainted with the navigation of the river. Upon the facts I am clearly of opinion that the vessel was not proceeding to sea.

Rule discharged (a).

(a) The rule obtained by *Cowling*, who appeared for the pilot, was not argued. The par- ties, at the suggestion of the Court, came to an arrangement.

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THE first count of the declaration stated that, on the 19th of February, 1852, the plaintiffs, at the request of the defendants, bought of them, who then sold to the plaintiffs, a large quantity, to wit, 240,000lbs. weight, of good puddle bar iron, for the sum of 416*l*.; all the iron to be proved and delivered to the plaintiffs' works at Oldbury; 116*l*. to be paid in cash, and one bill of 150*l*. at two months, and 150*l*. at four months from the time of delivery. The declaration then contained an allegation of general performance, and laid as a breach the non-delivery of the iron.

A contract for the sale of a certain number of tons of iron by the ton "long weight," is not in contravention of the statute 5 & 6 Will. 4, c. 63, and the 5 Geo. 4, c. 74; and consequently such contract is valid. Per Pollock, C. B., Platt, B., and Martin, B.; Parks, B., dubitante.

The defendants pleaded, first, non assumpsit; and secondly, "that the contract for the sale and purchase of the said iron in the said first count mentioned was made between the plaintiffs and defendants after the passing of the Act of the 5 & 6 Will. 4, c. 63, relating to weights and measures, and was for the sale and purchase of iron, to wit, 100 tons of iron, by the ton weight, long weight, that is to say, at a certain illegal weight, to wit, by the ton weight consisting of 2400lbs. avoirdupois, being more than twenty cwt. of the standard weight in the said Act mentioned; contrary to the form of the statute in such case made and provided. Issues thereon.

At the trial, before *Martin*, B., at the Middlesex Sittings in last Michaelmas Term, the following sold note was given in evidence:—

"Sold to Messrs. Jones 100 tons of good puddle bar iron, for 416*l*. All the iron to be proved and delivered to their works; to be long weight; 116*l*. to be paid in cash, and one bill of 150*l*. at two months, and 150*l*. at four months from the delivery.

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It appeared that the ton long weight consisted of 2400lbs. Under the direction of the learned Judge, a verdict was entered for the plaintiffs upon the first issue, and for the defendants upon the second.

In the same Term, *H. Hill* obtained a rule nisi for a new trial, on the ground of misdirection, or to enter judgment for the plaintiffs upon the issue raised by the second plea, non obstante veredicto.

The rule was argued last Hilary Term by *Keating* and *Archibald*, who shewed cause; and by *H. Hill* and *Gray*, who were heard in support of the rule; and the Court (a), after hearing the arguments, took time to consider their judgment; but they afterwards intimated that, although they were unanimously of opinion that the plea was proved, yet they entertained great doubt upon the question as to the validity of the plea; and that they would hear that point re-argued by a single counsel on each side.

The rule was re-argued on this point last Term (May 1) when

Archibald shewed cause.—The question now is, whether the contract set forth in the plea is void. It is submitted that a sale by the “ton, long weight,” is impliedly prohibited by the statute 5 & 6 Will. 4, c. 63, and consequently is illegal and void. The ton long weight is at variance with the ton authorised and prescribed by this statute. The plaintiffs contend that there is no such prohibition. The main object of the Legislature in passing the 5 & 6 Will. 4, c. 63, appears from the introductory portion of the 3rd section, which, after reciting the 5th Geo. 4, c. 74, and the 6th Geo. 4, c. 12, and that, “notwithstanding the provisions of the said recited Acts, many sets of weights and measures of old accustomed and different shapes have been

(a) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Martin*, B.

made and verified and stamped by the Chamberlains, as well as by the Auditor in the Exchequer, as models of the said new standards, and have been used as standard weights and measures under the said recited Acts, although different in shape and form from the standards prescribed by the said recited Act of the fifth year aforesaid; and it is therefore expedient that such standard weights and measures should be made legal, and that the Comptroller-General or some other officer of the Exchequer duly authorised should be empowered to compare and verify, and stamp as so compared and verified, standards of length, weight, or measure, although not exact models and copies in shape and form of the respective standards of length, weight, and measure deposited under the provisions of the said first-recited Acts in the office of the said Chamberlain and Auditor. And whereas it is expedient that the use of all weights and measures not in conformity with the weights and measures established by the said recited Acts should be prohibited, and that the use of the heaped measure should be abolished," enacts "that so much of the said last-mentioned recited Acts, as require that all weights and measures shall be models and copies in shape or form of the standards deposited in the Exchequer, and also so much of the said recited Acts as allow the use of weights and measures not in conformity with the imperial standard weights and measures established by the said Acts, or allow goods or merchandise to be bought or sold by any weights or measures established by local custom, or founded on special agreement, shall be and the same are hereby repealed." The use of customary measures varying from such as are prescribed by this Act is impliedly prohibited by the 11th section, and, except for the proviso which it contains, a contract made by any multiple or by some aliquot part of the pound weight would not be legal. The 21st section not only imposes a penalty on the use of weights or

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measures not authorised by the Act, but also renders void all contracts made by any such unauthorised weights or measures. It enacts, amongst other things, that "every person who shall use any weight or measure other than those authorised by this Act, or some aliquot part thereof as hereinbefore described, or which has not been so stamped as aforesaid, except as hereinafter excepted, or which shall be found light or otherwise unjust, shall on conviction forfeit a sum not exceeding 5*l.*; and any contract, bargain, or sale made by any such weights or measures shall be wholly null and void, and every such light or unjust weight and measure so used shall, on being discovered by any inspector so appointed as aforesaid, be seized, and on conviction of the person using or possessing the same shall be forfeited; provided always that nothing herein contained shall extend to require any single weight above 56*lb.* to be inspected and stamped, such weight of 56*lb.* being the greatest of the imperial standard weights deposited in the Exchequer." Now, amongst the weights denominated and authorised by the Act is the "ton" consisting of twenty hundred weights, each hundred weight consisting of eight stones, and each stone consisting of fourteen standard pounds avoirdupois. The plaintiffs contend that the statute is limited to weights less than a ton, but there is no such limitation in the Act. The words of the 21st section, by which a penalty is imposed upon every person who shall use any weight or measure *other than those authorised by this Act, &c.*, are general. But then it is further contended by the plaintiffs that there is no prohibition of a *contract* made by such weight that can be inferred from the 11th section of the same Act, inasmuch as that section, which is in *pari materiâ* with the 12th section of the 4 & 5 Will. 4, c. 49, omits the words to be found in the prior statute, viz. that "all contracts made by any other stone, hundred weight, or ton, from and after the 1st day of January, 1835, shall be null

and void." But the reason is, that the 21st section of the latter Act, the 5 & 6 Will. 4, c. 63, contains a similar provision, which would include the case contemplated by the 12th section of the 4 & 5 Will. 4, c. 49. It is to be observed, that the 14th section of the last-mentioned Act contains similar language to the 21st section of the 5 & 6 Will. 4, c. 63, prohibiting the making of contracts by unauthorised weights. The insertion of the same provision in two clauses of an Act of Parliament was, no doubt, thought by the framer of it to be unnecessary and superfluous. The 3rd section of the 5 & 6 Will. 4, c. 63, expressly prohibits the use of customary weights at variance with the standard weights. By the 15th section of the 5 Geo. 4, c. 74, contracts made by such weights were legal, provided the ratio they bore to the standard weight was stated in the contract. The section enacted, "that, from and after the 1st day of May, 1825, all contracts, bargains, sales, and dealings, which shall be made or had within any part of the United Kingdom of Great Britain and Ireland, for any work to be done, or for any goods, wares, merchandise, or other thing to be sold, delivered, done, or agreed for by weight or measure, where no special agreement shall be made to the contrary, shall be deemed, taken, and construed to be made and had according to the standard weights and measures ascertained by this Act; and in all cases where any special agreement shall be made with reference to any weight or measure established by local custom, the ratio or proportion which every such local weight or measure shall bear to any of the standard weights or measures shall be expressed, declared, and specified in such agreement, or otherwise such agreement shall be null and void." This clause has been expressly repealed by the 3rd section of the 5 & 6 Will. 4, c. 63. It is clear, therefore, that the 3rd, 11th, and 21st sections of the latter statute render void a contract made by any weight at variance with the standard weights, and that the sta-

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tute cannot be taken as confined to the actual *use* of the unauthorised weight itself. Several authorities are to be found which are in the defendants' favour. In *Rex v. Major* (a) it was held that the sale of corn by a customary measure, namely, by a bushel exceeding the Winchester measure, was illegal. The defendant was convicted in a penalty under the statutes 22 Car. 2, c. 8, and the 22 & 23 Car. 2, c. 12. The 2nd section of the former Act enacts, "that if any person shall sell any sort of corn or grain, usually sold by bushel, either in open market or any other place, by any other bushel or measure than that which is agreeable to the standard marked in his Majesty's Exchequer, commonly called the Winchester measure, containing eight gallons to the bushel," he should forfeit a certain penalty. And the latter Act by section 2 enacted that "every person who shall sell or buy any corn, &c., in any other manner than is by the said Act (22 Car. 2) directed, shall forfeit and lose, beside the penalty of the former Act appointed, all corn, &c., bought or sold contrary to this Act, or the value thereof." In *Rex v. Arnold* (b), it was held that the *buyer* of the grain by the illegal measure was liable to the penalty. These cases are authorities to shew that the *contract* is void. They are also decisions upon statutes containing precisely similar provisions to the 5 & 6 Will. 4, c. 63. The object which the Legislature has had in view since the time of Magna Charta has been the establishment of uniformity in the weights and measures of this country. In *Noble v. Durell* (c), a custom that every pound of butter sold in a particular market town should weigh eighteen ounces, was held bad; but the Court guarded themselves from being understood to decide that, if the article had been sold by the lump or yard, the custom would have been objectionable. Lord *Kenyon*, C. J., said that this matter had en-

(a) 4 T. R. 750.

(b) 5 T. R. 353.

(c) 3 T. R. 271.

gaged the attention of the Legislature for five centuries, and adds, "they have thought it of the utmost importance that there should be one standard of weights and measures throughout the kingdom." And *Buller, J.*, after stating that the question was not whether a custom to sell butter in *lumps* of any particular weight was good, proceeds to say, "But the question here is, whether, when a person is selling butter under the specific denomination of a *pound* he shall be compellable to sell more than a pound. Butter is directed to be sold by *avoirdupois* weight, where a pound consists of sixteen ounces." In the more recent case of *Tyson v. Thomas* (a), a contract for the sale of corn by the *hobbet* was held illegal under the 22 Car. 2, c. 8, s. 2. But the plaintiffs contend, that the contract is rendered valid by the proviso to the 11th section of the 5 & 6 Will. 4, c. 63, as being a contract for a quantity of iron by a "multiple of the pound." If the declaration alone be taken into consideration, this argument may have some weight; but the plea fixes the contract to be by the "ton," and by a ton of a different denomination to that prescribed by the statute. The Act not only gives the standard of weight, but particular denominations of weight also. If contracting parties adopt the denomination "ton," they must avail themselves of that given by the Act. If this were not so, the Act would be rendered altogether nugatory. Here the parties have not used a quantity which is simply the multiple of a pound, but they have contracted by the ton long weight, which, in differing from the standard ton, is illegal, and therefore the contract is void.

Gray in support of the rule.—The contract as set forth in the plea is valid. The plea itself shews that the contract was for the sale by the multiple of a pound. Such a

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contract falls expressly within the proviso to the 11th section of the 5 & 6 Will. 4, c. 63. Now that statute, and in part the 5 Geo. 4, c. 74, must be taken in conjunction, in so far as the last-named statute is not repealed by the later Act. The real object the Legislature has had in view has been to fix a standard or unit in weights, and that standard or unit is the pound weight. Contracting parties may therefore make their purchases and sales by any weight they may please, and call the weight by any name they please, provided such weight be either a multiple or an aliquot portion of the standard pound. These Acts were further intended to prohibit the *use* of illegal weights, and to render contracts to be carried out by the use of such weights void. Here the parties have adopted the term "ton long weight," which is well-known to consist of 2400lbs. avoirdupois. The meaning of the 11th section is this: If the term ton or cwt. or stone is simply used, then such term is to be understood to be of the value as fixed by that section. But the enactment merely provides that a ton or cwt. or stone shall be of such and such a weight. The "quarter" is a well-known expression for the quarter of a cwt., and yet it could never be contended that a contract for a certain number of quarters of iron would be illegal. The 31 Edw. 3, c. 2, directed, that weights according to the standard of the Exchequer should be sent to all the sheriffs of England. The several statutes which have been passed since that time respectively have reference to the standard in the Exchequer. The 4th section of the 5 Geo. 4, c. 74, shews that the pound troy was intended to be retained as the standard measure of troy weight, and the proportion which the ounce, pennyweight, grain, and dram are to bear to such pound are there given. The 5th section gives the mode of restoring the standard pound in case it shall be lost or injured. The 11th section directs, that copies of such standard troy pound shall be made and verified, and

shall be deposited in the office of the Chamberlains of the Exchequer at Westminster. But that section contains no mention of any larger weight than the pound. In like manner the 11th section of the 5 & 6 Will. 4, c. 63, has reference to the *unit* of standard, which is the *pound* avoirdupois. The 12th section requires the number of pounds which a particular weight may be, to be stamped or cast upon it. An ironmaster would be at liberty to cast weights of 2400lbs. each, and to contract for the sale of his iron by such weights. He would be equally at liberty to call the weight "a ton long weight." Under the 31st section a person would not subject himself to a penalty by making a price list by the "ton long weight;" but if the list contained the term "ton" simply, and that ton was intended to be a ton long weight, such case might be within the section. The 21st section, in speaking of weights and measures authorised by the Act, means weights of one pound, and of the multiple and aliquot parts of a pound. Lastly, the 16 & 17 Vict. c. 29, "An Act regulating the Weights used in Sales of Bullion," which referred to the 5 Geo. 4, c. 74 and the 5 & 6 Will. 4, c. 63, affords an additional argument that the pound alone is the standard weight.

Cur. adv. vult.

The learned Judges now delivered their opinions *seriatim*.

MARTIN, B.—This was a rule for judgment non obstante veredicto on the second plea. After much consideration, I have not been able to satisfy myself that the plea is good. There is no ambiguity in its language which could be aided by the verdict, and the question simply is whether a contract for the sale of 100 tons of iron *long weight*, being a phrase perfectly well known to mean tons of twenty cwt. of 120lbs. each, is illegal and void.

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The question depends upon the construction of the statute 5 Geo. 4, c. 74, and 5 & 6 Will. 4, c. 63.

By the 4th section of the first statute, the pound avoirdupois is enacted to be a certain specified fixed weight; but the weights denominated the stone, the cwt., or the ton are not mentioned in the statute, although the use of them as denominations of weight in the sale of goods has been common for centuries. The 15th section enacts, that all contracts for the sale of goods by weight, when no agreement shall be made to the contrary, shall be deemed to be made according to the standard weight; and that, where a special agreement shall be made with reference to any weight established by local custom, the ratio or proportion which every such local weight shall bear to the standard weight shall be expressed in the agreement, otherwise the agreement shall be void. As has been already observed, the statute refers to the pound weight only, and declares it to be the standard weight; and I apprehend the true meaning of this section is, that if, for instance, two persons agreed to sell and buy 20lb. weight of any article, the law would conclusively put upon the contract the construction that it was for 20lb. standard weight, and no evidence as to the real meaning of the parties that some local or customary pound was intended would be admissible. And again, if, for instance, there had existed at Birmingham a local pound, of either more or less weight than the standard pound, a contract for the sale of goods by the local pound would have been, and possibly still is, void, unless the ratio which it bears to the standard pound was expressed in the contract itself. There was nothing, however, in this statute to prohibit a sale by an expression signifying any number of standard pounds; a sale of 100lbs. of iron would be a lawful sale of 100 standard pounds; a sale of 1 cwt. of iron would be a lawful sale of 112 standard pounds; and a sale of 1 cwt. long weight would be a lawful sale of 120 standard pounds. It would

only have been necessary to ascertain the true meaning of the expression used by the parties to the contract, and if it meant a certain number of pounds standard weight it would have been legal. It is to be observed also, that the 16th section of this statute permitted the use of weights (meaning thereby the weight itself), although not of the same weight as the standard, but provided that the ratio which they bore to the standard should be painted or marked upon them, and this for the purpose (as the statute expresses) that such ratio should become a matter of common notoriety.

This statute was made in 1824, and eleven years afterwards (1835) the statute 5 & 6 Will. 4, c. 63, was passed. This statute seems to me to extend further the principle of the former one. The Legislature seems to have considered that the enactments by which it was provided, that in contracts of sale by local weight the ratio between it and the standard weight should be expressed in the contract itself, and that all weights not of the standard should have painted or marked upon them the same ratio, after being in force and operation for eleven years, would have rendered familiar to the public what the imperial standard pound was; and accordingly, by the 3rd section, the use of all weights different from the imperial standard (which had been permitted by the 6th section of the former statute) was from thenceforth prohibited. The result of this enactment seems to me to be, that all weights whatever which are different from the imperial standard are now illegal, and that the only weights which the law permits to be used for actual weighing is the imperial standard pound, or some multiple of it, or fraction of it.

This seems to me tolerably clear, but the difficulty in the present case is as to the construction of the 11th section of the last statute. This section, after reciting "that by local custom in markets, towns and other places throughout the United Kingdom the denomination of the stone

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weight varies, enacts that thenceforth the weight denominated a stone shall in all cases consist of fourteen standard pounds avoirdupois, and that the weight denominated an hundred weight shall consist of eight such stones, and that the weight denominated a ton shall consist of twenty such hundred-weight. Provided that nothing should prevent any bargain, sale, or contract being made by any multiple or by some aliquot part, such as the half, the fourth, the eighth, or the one-sixteenth of the pound weight."

Upon the best consideration I have been able to bestow upon the subject, I have arrived at the conclusion that the true object and meaning of this section was to extend the provision contained in the 15th section of the former statute. By this section a statutory meaning is given to the word or denomination pound (lb.); and no evidence is admissible to shew that the parties using it really meant and intended a weight different from the standard. By the 11th section of the latter statute, a statutory meaning seems to me to be given to the three words or denominations, *stone*, *cwt.*, and *ton*; and if, for instance, there existed in any particular part of the country a stone called "the long stone," being of 16lbs, and a contract was then made for the sale of a stone of any article by the long stone, the operation of the 11th section would be to affix an absolute statutory meaning to the word "stone;" that the word "long" would be considered as of no avail, and that all evidence that the parties really meant 16lbs. (pounds) would be inadmissible, and the contract would in legal construction be deemed to be for 14lbs. standard weight. If I am correct in this view as regards the word "stone," the same construction would of course apply to the words or denominations "long hundred," or "ton long weight;" and, as applicable to the present case, the result would be, that the sale was a lawful sale, but that the contract would be fulfilled by the delivery of 100 tons of iron of 2240lbs avoirdupois each ton.

In the course of the argument I was inclined to think,

that the 21st section rendered the contract illegal. Upon consideration, however, I am satisfied that it has reference to false and dishonest weights only, and has no bearing upon the present question.

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I think that what the law prohibits is, the use of any pound other than the standard pound, and that all contracts for sale by weight must be by this standard pound; and further, that, if parties in contract use the words or denominations "stone," "hundred weight," or "ton," they shall be conclusively taken to mean the weights mentioned in the 11th section; but if they use any other word or denomination of weight, which, according to the ordinary rules of law applicable to the use of words, means a multiple of the standard pound, it is my opinion that it is lawful for them so to do, and that a contract using such word is legal. This is in exact conformity with the judgment of the Court of Queen's Bench, delivered the other day in the case of *Hughes v. Humphreys* (a), where the word 'hobbet' was used in a contract for the sale of wheat.

This construction of the statute would probably shew, that the plaintiffs would have been compelled to amend their declaration at the trial, if the objection had been taken that the contract alleged in it had not been proved. This objection, however, was not taken, and justice will be done, if the damages are confined to the deficient delivery, calculating the ton as meaning 2240 pounds, and not 2400 pounds.

FLATT, B. (After stating the pleadings, his Lordship proceeded:—) The question now arises, whether that plea is good. By the 5 Geo. 4, c. 74, s. 4, a standard was adopted for a troy pound, it was a brass weight in the custody of the clerk of the House of Commons, and that was to be the standard; and it has been the policy of all these Acts, which regulate weights and measures, to lay down, or at least to institute, if I may say so, a standard, or what they

(a) 3 E. & B. 954.

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call the unit, which is to be divisible or capable of being multiplied, so as to form a legal weight by which parties may deal. Now the troy pound is therefore made a standard; the brass weight is made the standard of the troy pound by the 5 Geo. 4, and the twelfth part of that standard is enacted to be an ounce, and the twentieth part of that to be a pennyweight, and the twenty-fourth part of that pennyweight a grain. To shew what the object of the Legislature has been throughout all these enactments relating to weights and measures, it may be as well, before one leaves the troy pound, of which the standard is thus given by the 5 Geo. 4, to advert to the 16 & 17 Vict. c. 29, s. 1, because another standard is there given for the articles to be dealt for in troy weight; for it was found ill adapted, no doubt, to foreign commerce, and to dealings between merchants in diamonds and commodities of that kind, and an inconvenient mode of thus dividing the parts of the standard, that is to say, into pennyweights and grains: and we find by the 16 & 17 Vict. c. 29, s. 1, it is enacted, that "all contracts and bargains made or to be made for sales of gold, silver, platina, diamonds and other precious stones, made and to be made by the troy ounce, as ascertained and fixed by the above-recited Act (5 Geo. 4, c. 74), and by any weights being multiples or decimal parts of such ounce, shall be deemed and reputed, and are hereby declared, to be good and valid in law." The troy ounce in those contracts, which is to undergo the decimal division only, is made the standard or unit for this particular purpose, which was no doubt for the convenience of this branch of commerce, adding another unit, if I may say so, to the unit already given with regard to the troy weight. But with regard to the avoirdupois weight the case is different; there is no variation whatever from the standard there, and that standard is thus laid down and given by the 5 Geo. 4, c. 74, that inasmuch as the troy pound, when divided into grains, amounts to 5760 grains, the avoirdupois pound should bear the proportion to

the troy pound as 7000 to 5760, that is to say, it is very near the ratio of four to three; but that is the only definition we have of the pound avoirdupois weight. Thus the avoirdupois weight is obtained, and is made equal to 7000 grains troy, which, if divided by sixteen, makes the ounce, and which, if divided by sixteen, produces the dram; and that was the standard which seems to have been continued the standard ever since. By the same Act of Parliament, the 5 Geo. 4, c. 74, s. 15, it was enacted as follows:—[His Lordship read the section, and proceeded:]—So that if the bargain was to be made on the footing of weights according to a local custom, it was competent to the parties so to make it; but it was necessary, in order to enforce that contract and make it valid, to state the proportion that particular weight bore towards the standard weight. Now, the concluding part of that section was afterwards dealt with by the 4 & 5 Will. 4, c. 49, which was passed for the purpose of amending the statute to which I have before adverted, and of furthering the object which it had in view; and that statute commences by repealing a portion of the section which empowered parties to deal having reference to the local customary weights. It repeals that portion of the statute altogether; but the 4 & 5 Will. 4, c. 49 itself was afterwards repealed by the 5 & 6 Will. 4, c. 63, which introduces the present question. It begins by repealing the 4 & 5 Will. 4, c. 49; but, inasmuch as it did not mean to get rid of that repealing part of the commencement of the 4 & 5 Will. 4, c. 49, it excepts that portion of the statute of the 4 & 5 Will. 4, c. 49, which so repealed that part of the former section. That statute, after reciting (and it is most important to see what the object of the Legislature has been in all those enactments,) that it being expedient that the use of all weights not in conformity with the weights established by the 5 Geo. 4, c. 74, that is to say, of the weights of a pound, after stating “it is expedient that the use of all weights not in conformity with the weights established by the 5 Geo. 4,

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should be prohibited," it repeals also so much of those two last-mentioned Acts, that is to say, the 5 Geo. 4, c. 74 and the 6 Geo. 4, c. 12, as required that all weights should be models or copies in the shape of a standard deposited in the Exchequer, and so much as allowed the use of weights not in conformity with the imperial standard weights established by this Act, or as allowed goods to be bought or sold by any weight by local custom or founded on special agreement; therefore, that statute, in its commencement, repeals that enactment of the 4 & 5 Will. 4, c. 49, and repeals that portion of the section in effect, by preventing being repealed that portion of the last Act, or rather by re-enacting the original Act, for the purpose of preventing the operation of the general repeal by the last. Then comes the 11th section of the 5 & 6 Will. 4, c. 63, by which it is enacted, "That, from and after the passing of this Act the weight denominated a stone shall in all cases consist of fourteen standard pounds avoirdupois; and that the weight denominated an hundred-weight shall consist of eight such stones; and that the weight denominated a ton shall consist of twenty such hundred-weights." Now, undoubtedly, that lays clearly down what the standard weights are to be, viz.—14lbs. to the stone, eight of those stone to the cwt., and twenty of those cwt. to the ton. But the proviso keeps in view the standard or unit; for it seems that, if you refer your computation of poundage to the unit in any of your bargains, it will be quite sufficient: "Provided always, that nothing herein contained shall prevent any bargain, sale, or contract being made by any multiple or by some aliquot part, such as the half, the quarter, the eighth, or the sixteenth part of the pound weight;" that is the unit, or the standard, and that has been the standard throughout. And then, by that portion of the 21st section which applies to this case, it is enacted, "that every person who shall use any weight or measure other than those authorised by this Act, or some aliquot part thereof as hereinbefore described, or which has not

been so stamped as aforesaid, except as hereinafter excepted, or which shall be found light or otherwise unjust, shall on conviction forfeit a sum not exceeding 5*l.*; and any contract, bargain, or sale made by any such weights"—now these are the important words,—“made by any such weights or measures shall be wholly null and void.” If this contract had been made by an illegal weight, by a weight which was not for a certain number of pounds, there might be some reason in the objection; but it is not so, for this contract is made, not by any weight here prohibited, but by a weight which is the multiple of a pound. It is 12,000 scores of pounds; and if you put it in that form, would that be illegal? It is a certain number of pounds; a score is well-known to be 20*lbs.*; and what would 12,000 scores be? Then how does it come to be more wrong, that the parties should treat for six times the score. You say you take six scores for every one of your cwts., and say it shall be so many ton of 120*lbs.* for each cwt. Is this unknown? Can any one be deceived by this? The object of the Act of Parliament is to prevent any one being deceived by short weights. It is plainly denominating what is meant to be bought and sold. It is here called the long hundred weight, which is as perfectly well-known as that the figures 20 represent a score; and it seems to me, therefore, that, that being a plain multiple of a pound, it falls within the proviso of the 11th section. It therefore seems to me, upon the whole, that the contract does not involve, in its execution, the use of any prohibited weight; but that the contract for the sale of these goods is for a sale by a weight of a known denomination, which is an ascertained and known multiple of a pound. Therefore, for these two reasons, it seems to me the sale was legal, and that this plea is bad, and that judgment ought to be entered for the plaintiff upon it.

PARKE, B.—This case has been fully argued before us during Hilary and Easter Terms last, and has been the subject of much consideration by all of us.

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The pleadings are as follows: (His Lordship stated them and proceeded:)—It is clear that the plea was proved, for there is no question that the sale was by long weight, and that the meaning of the term long weight is 2400 lbs. avoirdupois to the ton, therefore there can be no new trial. It was indeed contended, on the second argument, by Mr. *Gray*, that the plea meant that the contract was for 100 tons long weight, expressed to be 240,000 lbs., which would be the same as if it had been for 240,000 lbs., and it then would be good. But if that be the meaning of the plea, then it was not proved, and there should be a new trial. But I think the meaning of the plea is, that the sale was by long weight, and that long weight meant 2400 lbs. to the ton, and that it was not expressed to be 240,000 lbs. in the contract itself. The only question then is, whether that plea, understood in that sense, is good after verdict.

This depends upon the construction of the 5 & 6 Will. 4, c. 63, taken in conjunction with the prior statutes relating to weights and measures. Does that Act make the contract void?

I have felt great difficulty in coming to a conclusion as to the meaning of the Legislature; but, after much consideration, I think that their intention must be taken to have been to prohibit the sale by weights other than the standard weights denoted in the statute, and long weight is not such a standard weight; and consequently, that a contract to sell by that weight is void; for every contract prohibited and made unlawful by a statute is therefore void^(a). The plea is therefore, I think, good.

The Act is one of a series, beginning with the 5 Geo. 4, c. 74, which repealed a great number of statutes, and was for ascertaining and establishing, as the title declares, uniformity of weights and measures; and the Act recites, that it is necessary, for the security of commerce and for the good of the community, that weights and measures should

(a) Lord *Holt*, Carth. 252, cit.

be just and *uniform*, and that the true measure of the present standards is not verily known, which is the cause of great confusion and of manifest frauds.

Nothing can be clearer, therefore, than the intention of the Legislature to have one uniform standard; and the use of terms in contracts to describe both weights and measures other than those established by law, whereby confusion may arise and frauds may be committed on strangers unacquainted with local usages, is within the same mischief; and whether it is actually prohibited by any of the statutes on this subject is the question.

This Act provides for what shall be the standard measure of weight, from which all others are to be ascertained and computed, namely, the standard pound; and, by sect. 9, all contracts for goods to be sold by weight (except coals, &c.) shall be according to that standard of weight, or parts or *multiples* thereof.

Then the 15th section of the same statute provides, that all contracts, bargains, and sales for goods by weight or measure, where no special agreement shall be made to the contrary, shall be deemed to be made and had according to the standard weights and measures ascertained by that Act; and in all cases where any special agreement shall be made with reference to any weight or measure established by local custom, the weight or proportion which every such local weight or measure shall bear to any of the said standard weights or measures, shall be expressed, declared, and specified in such agreement, *or otherwise such agreement shall be null and void*.

The 16th section provides, that weights and measures not in conformity with the said standard weights and measures, but established by local custom or founded on special agreement, may be used, provided that the ratio which they bear to the standard weights and measures shall be marked thereon. This section applies to the actual use of specified weights and measures in weighing and measuring.

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Upon this statute it is clear that any agreement to sell by a customary pound, or any multiple of a customary pound weight, is absolutely void, unless the ratio it bears to the standard pound is expressed in the contract.

But the statute does not in *express* terms apply to the sale by a customary *stone, quarter, hundred-weight, or ton*, although such sales are clearly within the same mischief.

I will next consider what the effect of the subsequent statute, 5 & 6 Will. 4, c. 63, is.

The Act begins by repealing the stat. 4 & 5 Will. 4, c. 49.

By the 11th section, which recites that, by local customs in markets, towns, and other places, the denomination of the *stone* weight varies, it is enacted, that, from and after the passing of this Act, the weight denominated a stone, shall, *in all cases*, consist of 14lbs. avoirdupois; and that the weight denominated a hundred-weight shall consist of eight such stones; and that the weight denominated a ton shall consist of twenty such hundred-weights. Provided always, that nothing herein contained shall prevent any bargain, sale, or contract being made by any multiple, or by some aliquot part, such as the half, the quarter, the eighth or the sixteenth part of the pound weight.

Now, this section comes in place of the 12th section of the repealed statute 4 & 5 Will. 4, c. 49, which is as follows:—
“ And whereas, by local customs in the markets, towns, and other places throughout the United Kingdom, the denomination of the stone weight varies, being in the country generally deemed to contain 14lbs. avoirdupois, and in London commonly eight of such pounds, or otherwise, as may be: Be it therefore enacted, that, from and after the 1st of January, 1835, the weight denominated a stone shall, in all cases, consist of fourteen standard pounds avoirdupois; and that the weight denominated an hundred-weight shall consist of eight such stones; and that the weight denominated a ton shall consist of twenty such hundred-weights; and all contracts made by any other stone, hundred-weight, or ton, from and after the 1st day of January, 1835, shall be *null and void*.”

It will be seen that this section expressly *avoids* all contracts by any other than the statutory stone, cwt., or ton; whereas the corresponding section in the 5 & 6 Will 4, does not provide, in *express* terms, that the contract should be void. This affords, undoubtedly, a strong argument that the Legislature in the latter Act did not intend this consequence to follow.

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But then comes the question whether, notwithstanding the want of the express enactment in this particular clause, the intention of the Legislature can be sufficiently collected from the different provisions of the Act, coupled with some of the provisions of the old Act, to prohibit such contracts; and if they do prohibit them, no Court of law can enforce them. I have come to the conclusion that this is to be collected from different parts of the two Acts.

In the first place, the 11th section, above recited, going beyond the recital, which states the discrepancy of the stone only (and enactments go very often beyond the recital) provides that the cwt. shall, *in all cases*, that is, in all cases of contracts, consist of eight stones of 14lbs, and a ton of twenty such cwts.; and it follows, that, in every case, it shall not consist of any other number of pounds than 112lbs to the cwt., and twenty times that amount to the ton; and, in effect, it prohibits contracts for any other description of cwt. or ton.

The proviso shews clearly that the section relates to all *bargains, sales, and contracts*, and excepts out of them, *pro majore cautela*, contracts by the multiple or aliquot parts of the pound standard; and, if such contracts are prohibited, it is clear that they cannot be enforced in a Court of law, though they are not expressly declared to be null and void.

And this provision as to weight agrees with the principle of the 6th section, whereby all local and customary *measures* are abolished, and parties are liable to a penalty for *selling by them*.

This shews that contracts to sell by other than the statutory measures are incapable of being enforced; for it is so,

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generally speaking, if subject to a penalty. Courts of law cannot enforce a contract which is meant to be prohibited by a penalty.

If this is intended, as I think it clearly is with respect to *measures*, can any reason be assigned for *not* prohibiting sales by customary *weights*?

And this agrees with the unrepealed part of the 5 Geo. 4, c. 74; for it will be found upon a careful comparison of the two Acts, 5 Geo. 4 and 5 & 6 Will. 4, that sect. 15 of the former Act is unrepealed.

It is clearly the 16th section which is repealed by the 5 & 6 Will. 4, and not the 15th; and the unrepealed 15th section clearly renders void the sale by special agreement by weights established by local custom, unless the agreement specifies the proportion that the local customary weight bears to the standard weight.

It is said that this statute, 5 Geo. 4, only provides for the standard *pound* and its multiple, not for the quarter, cwt., or ton.

Admitting that it does so, it still forms a strong ground for giving a similar construction to the 11th section of 5 & 6 Will. 4; for, if a sale by every customary pound is prohibited and rendered void, what reason can be given for not prohibiting the sale by the cwt. or ton?

The 21st section enacts that "every person who shall *use* any weight or measure other than those *authorised by this Act*, or some *aliquot part thereof*, as hereinbefore described, or which has not been so stamped as aforesaid, except as hereinafter excepted, or which shall be found light or otherwise unjust, shall, on conviction, forfeit a sum not exceeding 5*l.*; and any contract, bargain, or sale made by any *such* weights or measures shall be wholly null and void; and every such light or unjust weight and measure so used shall, on being discovered by any inspector so appointed as aforesaid, be seized, and on conviction of the person using or possessing the same shall be forfeited."

The immediate object of this 21st section probably was

to prohibit the use of and contracts for a sale by certain *specific weights* which are not according to the Act, or are not properly stamped; and if the case depended upon that section alone, and there were no other provisions on the subject of contracts, I think sales by customary weights would not be prohibited. But the provision makes the whole system complete.

To secure against confusion and fraud, the use in weighing and measuring of all unauthorised weights and measures to weigh and measure by is prohibited. All contracts by such specific weights and measures, as for instance where a vendor had such unauthorised weights and measures in his possession, and contracted to sell by them, and lastly all contracts by the pound, stone, cwt., ton, &c., and by the foot or yard, or gallon, customary or local measure, are prohibited.

I think, therefore, that it appears sufficiently clear that this particular contract is forbidden, and consequently is void.

It occurred to me in the course of the argument, that the 11th section of the 5 & 6 Will. 4 might be explained to mean that, if there was a contract to sell by the stone, or cwt., or ton, without any mention of customary weight, it should be held to mean that the weight should be 14lbs., 112lbs., and 2240lbs. respectively. That is clear. And that, if the parties stipulated for a *customary* stone, or a *customary* hundred-weight or ton, the contract should be interpreted, against the meaning of the parties, to be for the *statutory* weight only.

I think this would be an unreasonable construction. If the contract prohibited is illegal, both parties are in equal fault, and are equally punished; if it be held void, as it must be, neither the vendor can oblige the vendee to take, nor the vendee oblige the vendor to deliver; and if the vendor chooses to deliver (being presumed to be conversant with the law), he suffers by his own fault. But if the contract be held valid in a different sense from that of the

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contractors, the punishment is unequal. If the contract be for customary stones (8lbs. each), the purchaser gains 6lbs. on each stone, and so punishes the vendor by obliging him to deliver so much. On the other hand, if the contract be for a ton *long* weight, the vendor gains, and so punishes the purchaser: for, having agreed to sell 2400lbs., he is entitled to the price if he delivers only 2240lbs.

I think the Legislature never could have intended what appears so very unreasonable. Of course, they might have enacted that such should be the consequence in express terms, but they certainly have not done so.

One more observation remains. The proviso in this 11th section, that contracts may be made by a multiple or aliquot part of a pound, cannot, in my opinion, be applied to such a case as this, on the ground that long weight being known to be 2400lbs. weight to the ton, the parties may be taken to have contracted for a multiple of 120lbs., as they contracted for tons.

To bring this case within the proviso, they should have contracted for so many parts of pounds, or statutory multiples of pounds, as stones, cwts., tons.

To allow the customary weight to be translated into pounds is to defeat the object of the Legislature; which appears by the recital of the 5 Geo. 4, and in the recital to that section also, to be to prevent disputes about customary weights, which vary in different places. It is true, the section recites a variation by local custom as to the stone only, but the section provides also for cwts. and tons, which are in the same mischief. A contract with a stranger in the market, or with a person in a distant part of the kingdom, would be likely to generate a dispute, as the contract be according to the custom or not, and as to the quantity of the customary weight. I have come to the conclusion, for the reasons I have stated, that the contract was void, and that the plea is good, and consequently that the plaintiff is not entitled to judgment. But I will add that, since I pre-

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pared my judgment on this case, I have heard that the Court of Queen's Bench, a few days ago, decided a similar case on the question of a sale of wheat by the 'hobbet,' on the ground that the statutes did not apply to sales by weight (a). I think we should hold such decision to be binding, though I cannot hear that the provisions of these complicated and not very intelligible statutes were fully brought before them. The verdict, therefore, must be entered for the defendant on the plea, and the judgment non obstante veredicto for the plaintiff.

POLLOCK, C. B.—I agree with my Brothers *Platt* and *Martin* that our judgment ought to be for the plaintiff, notwithstanding the verdict on this plea; and I agree with them, not in the qualified way in which my Brother *Parke* has agreed with them, but entirely and absolutely. Had I to decide the matter myself, I should, upon the statutes which relate to the subject, have come to the same conclusion, quite apart from the holding of the Court of Queen's Bench in a recent case, which, however, ought by no means to be overlooked, if there were presented a serious difficulty in the case. I am of opinion that the question, whether a sale by the long hundred is lawful, ought to be answered in the affirmative. I think it is wholly immaterial whether the sale was of so many tons of the long hundred, or of so many long hundreds as would make the number of tons. In either case the sale is by the long hundred; and I am of opinion that, by the 11th section of the 5 & 6 Will. 4, c. 63, a sale is valid which is made by the long hundred, it being

(a) His Lordship stated, that he had been favoured by Mr. *Ellis* with the MS. report of this case. Undoubtedly, however, the decision did not proceed on this ground, but on the ground that, as it appeared upon the evidence given at the trial, the corn, though contracted for by the

"hobbet," was in fact weighed before delivery, and upon such weighing every "hobbet" was made to consist of exactly 168 lbs., (which was the well-known capacity of a "hobbet"), it was in fact a sale, not by measure, but by the multiple of a pound weight, and so not avoided by the statutes.

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a multiple of the pound, as the pound is in reality made the standard. If it be not valid by reason of the application of the 21st section, then the transaction must not only be void, but the parties dealing with or using this weight, as it seems to me, may be liable to a penalty; and whether we consider the construction of the Acts without reference to the imposition of a penalty, or as interfering with the ordinary, and what may even be called the natural rights of persons to make their contracts in their own way, I think, before we come to the conclusion that a contract is void, and that the parties have possibly incurred a penalty by so contracting, we ought to be satisfied that such is the clear and plain meaning of the Legislature; and I certainly must say for one, I should not arrive at that conclusion by a comparison of various sections of various Acts of Parliament, which, at the least, I should be compelled to admit to be very difficult and obscure. I do not think that parties should be subject to penalties, or that their contracts should be held null and void, merely on the ground that, in an obscure and difficult Act, or rather in three or four Acts, one might by possibility come to a conclusion that probably or possibly such was the meaning of the Legislature. The 4 & 5 Will. 4, c. 49, is entirely out of the question, except as throwing some light upon the matter by what that statute contemplated, for that statute is now entirely repealed. The whole question turns upon the true construction of the 5 Geo. 4, c. 74, and the 5 & 6 Will. 4, c. 63. Now, it was contended at the bar, and to some extent my Brother *Parke* has adopted the view, that the 9th section of the 5 Geo. 4, c. 74, may be unrepealed, which provides, that all contracts, bargains, sales, and dealings made or had for or with respect to any coals or any other goods to be sold, delivered, done, or agreed for by weight or measure, shall and may be made and had according to the said standard of weight, and so on. This is, no doubt, a positive enactment that it shall be so; and if it were not altered by what has been enacted since, no doubt

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it would remain the law, and it would be necessary that every contract should be according to the standard; and there is no doubt that, by the 15th section of the same statute, which also is unrepealed, all contracts of sale shall relate to the same standard; and that, "where any special agreement shall be made with reference to any weight or measure established by local custom, the ratio or proportion which every such local weight or measure shall bear to any of the said standard weights or measures shall be expressed, declared, and specified in such agreement, or otherwise such agreement shall be null and void." I do not think that section in any way applies to the present subject. I think that the long hundred is not a local weight. It is as much a known weight, and known in every part of the kingdom where the English language is spoken, as the hundred weight of 112lbs.; it is not a local term like that of the hobbet, or like the other expressions for weights which we meet with on the different circuits. Formerly, we used to meet with weights and measures not familiar to every one, but the "long hundred" is to be found in every English dictionary professing to treat of weights and measures, and in every work of philosophy that deals with the subject. I am of opinion, therefore, that to apply to a weight of that kind the term "local weight" is a misapplication of language. The long hundred is recognised in several Acts of Parliament, which expressly provide, with respect to certain public bodies, that all their contracts, and all their measurements and other dealings, shall not be taken by the hundred-weight of 112lbs, but by the long hundred. It appears to me that makes it to be perfectly clear, that the long hundred, though not a standard weight, is not a customary or local weight, but a general and well-known weight called the long hundred, although now, by Act of Parliament, no longer permitted to be considered as one of the standard weights. And therefore, it is not necessary to express in any contract or agreement which is by the long hundred, that such

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weight is an hundred weight of 120lbs. Then, how does the 11th section apply to the subject thus expressed? It begins by reciting, that "whereas, by local customs in markets, towns, and other places throughout the United Kingdom, the denomination of the stone weight varies; be it therefore enacted, that, from and after the passing of this Act, the weight denominated a stone shall, in all cases, consist of fourteen standard pounds avoirdupois, and that the weight denominated an hundred-weight shall consist of eight such stones, and that the weight denominated a ton shall consist of twenty such hundred-weights." It then contains a proviso, "that nothing herein contained shall prevent any bargain, sale, or contract being made by any multiple or by some aliquot part, such as the half, the quarter, the eighth, or the sixteenth part of the pound weight." I apprehend that, even if a weight were a customary weight confined locally to certain parts of the kingdom, if it were well known what multiple of a pound that weight indicated, it would be sufficient for the purpose, and it would be perfectly legal to make a bargain by that weight; as, for instance, in the case lately before the Court of Queen's Bench, where they decided, that a sale by the hobbet, being well known, where it is used, to be in weight 168lbs., and so being a multiple of the standard pound, the 11th section does not prevent you from buying and selling by that weight. Under these circumstances, it clearly appears to me that the 21st section of the 5 & 6 Will. 4, c. 63, which is the only prohibitory clause, does not apply to this case; and that, under the 11th section, it was competent to the parties to buy and sell by the long hundred, being a multiple of the pound weight perfectly well known, and requiring no explanation. With respect to the stone weight of 8 lbs., and the stone of 14 lbs., they are known and distinguished in books—the 14 lbs. stone as horse weight, and the 8 lbs. stone is known by some other denomination; and therefore, probably, now an agreement by the stone, if nothing more

were said, would import the stone of 14 lbs.; but an agreement designating the stone by the stone of 8 lbs., and giving that a name, if it were as well known as the long hundred, a contract of that sort, being by a multiple of the standard pound weight, would, I think, be perfectly valid. I therefore fully concur with my Brothers *Platt* and *Martin* that our judgment must be for the plaintiff, upon the ground that this contract being by the long hundred, a well-known established weight, which, though not now a standard weight, but at all events a multiple of the pound, it was competent to these parties to make their bargain as they have here done. The judgment, therefore, will be non obstante veredicto for the plaintiff. I must add, that I am exceedingly glad, in this as well as in every other case where we differ in opinion, that the matter is on the record, so that, if we are wrong, our judgment may be set right by a Court of error.

Rule absolute accordingly.

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POTTER and Others v. THE COMMISSIONERS OF
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June 15.

THIS was a case stated by the Commissioners of Inland Revenue, pursuant to the 13 & 14 Vict. c. 97, s. 15, to enable the Messrs. Potter to appeal to this Court against the determination of the Commissioners as to the stamp duty chargeable upon a certain deed.

This deed was dated the 26th of September, 1853, and was made between Harold Potter of the first part, Charles Potter, Edwin Potter, and John Gerald Potter of the second part, and Charles Potter of the third part. It recited a deed of copartnership, dated 18th of October, 1850, between the above-named four persons, as paper-makers and paper-stainers, for five years, under the style or firm of

The assignment, by deed, of the goodwill of a trade, is a conveyance of "property" within the Stamp Act, 13 & 14 Vict. c. 97, Sched. tit. "Conveyance," and, as such, is liable to ad valorem duty.

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"C., H., & E. Potter," with a provision, amongst others, that the capital should consist of a certain sum, to be made up and contributed as therein mentioned. That Harold Potter was about to retire; and that the value of his share in the capital, stock, property, credits, and effects of the said copartnership, (including freeholds, &c.) had been estimated at 19,202*l.* 2*s.* 8½*d.* That it was arranged that Charles and Edwin should pay to Harold that sum by the instalments thereafter covenanted to be paid, and should be entitled to Harold's share, thus—Charles to have two-thirds, and Edwin one-third. That Charles should pay to Harold 20,000*l.* for the purchase of the entirety of the said Harold's part, share, and interest of and in the goodwill of the said business, and by the instalments thereafter mentioned; and it contained certain provisions for a fresh partnership between the remaining parties by deed already prepared. That the share of Harold was intended to be conveyed by three separate deeds, on two of which ad valorem duty had been already paid on sums amounting in the aggregate to 5423*l.* 6*s.* 8*d.*, which, being deducted from the said sum of 19,202*l.* 2*s.* 8½*d.*, left 13,778*l.* 16*s.* 0½*d.* as the consideration money for the assignment thereafter made of the share of the said Harold in the partnership capital, stock, &c. The deed then witnessed that, in pursuance of the said agreement, and in consideration of the premises, the parties covenanted with each other, that the partnership should be dissolved; and it was thereby further witnessed, that, in pursuance of the agreement, and in consideration of the premises, and also of the covenants of Charles and Edwin thereafter contained, Harold did bargain, sell, assign, transfer, and set over unto the said Charles and Edwin, their executors, administrators, and assigns, all that the part or share of him the said Harold Potter of and in the stock in trade, goods, machinery, and other chattels and effects used and employed in or belonging to the said business of paper making and paper staining, lately carried on by the said

parties, except the said freehold and leasehold messuages, &c., the said Harold Potter's share whereof had been or was intended to be conveyed by said other indentures, and also of and in the credits, sums of money, &c., and all the estate, &c.: To have and to hold the same unto and by the said Charles and Edwin in the proportions and manner therein mentioned.

The deed then contained a power of attorney for Harold for the recovery &c. of debts in his name; a covenant for further assurance &c. by Harold; a covenant by Charles and Edwin to pay to Harold the full sum of 19,202*l.* 2*s.* 8*d.* by the instalments and in the manner therein mentioned. The deed then further witnessed that, in pursuance of the said recited agreement in that behalf, and in consideration of the premises, and of the covenants of the said Charles Potter next hereinafter contained for payment of the sum of 20,000*l.* and interest thereon, the said Harold Potter did thereby bargain, sell, *assign, transfer,* and set over, remise, release, and quit claim unto the said Charles Potter, his executors, administrators, and assigns all that the trade or business of paper making and paper staining carried on by the said parties thereto in copartnership as aforesaid, *and the goodwill of the same trade or business, and all benefit and advantage thereof,* and all the right, title, interest, possibility, benefit, claim, and demand whatsoever of the said Harold therein: To have, hold, receive, take, and enjoy all and singular the premises lastly thereinbefore assigned, or intended so to be, unto and by the said Charles Potter, his executors, administrators, and assigns, for his own absolute use and benefit (subject to the assignment thereinbefore made of the said Harold's share of the said stock in trade &c.)

The deed then contained a covenant by Charles Potter, in consideration of such assignment, to pay to Harold the full sum of 20,000*l.*, by the instalments therein mentioned; a covenant by Harold not to carry on the said business of a

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paper-maker and paper-stainer within certain distances, with a proviso, on breach thereof, to pay to the said Charles Potter, as liquidated damages, 10,000*l.*; and that all monies remaining due on the foregoing covenants of Charles and Edwin should cease; with mutual releases and covenants of indemnity.

The case then stated, that the said parties to the deed had presented it to the Commissioners unstamped, and desired to have the opinion of the Commissioners as to the stamp duty chargeable on the deed. The Commissioners, being of opinion that the deed was chargeable under the Act of Parliament with the ad valorem duty of 100*l.*, as a conveyance or sale of property by Harold Potter to Charles Potter for 20,000*l.*, and with certain other ad valorem duty (mentioned in the case), charged those sums as stamp duties payable upon the deed. From this determination Messrs. Potter appealed.

The question for the opinion of the Court was, with what (if any) amount of ad valorem stamp duty the deed was chargeable.

The case was argued last Easter Term (May 5) by

Hindmarch for the appellants.—The question for the opinion of the Court is, whether the assignment of the share of the goodwill of the trade by this instrument is an assignment of “property” within the meaning of that term contained in the schedule to the 13 & 14 Vict. c. 97, under the head of “Conveyance;” and consequently whether ad valorem stamp duty is payable upon it. The appellants contend that it is not. The schedule is as follows:—“Conveyance, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, *upon the sale* of any lands, tenements, rents, annuities, *or other property*, real or personal, heritable or moveable, or of any right, title, interest, or claim in, to, out of, or upon any lands, tenements, rents, annuities, or

other property, that is to say, for and in respect of the principal or only deed, instrument, or writing, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser or purchasers, or any other person or persons by his, her, or their directions,—where the purchase or consideration money shall exceed 600*l.*, then for every 100*l.*, and also for any fractional part of 100*l.* 10*s.*” The appellants contend that “goodwill” is not “property” within the meaning of the first branch of this clause; and further, that the instrument cannot operate so as to convey it, or to vest anything in the purchaser, within the meaning of the second branch of the clause. Several decisions have been pronounced by the Courts upon former Stamp Acts containing words precisely similar to those of the present; and those decisions are in the appellants’ favour. It is therefore presumed that this question has been raised by the Crown for the purpose of having the correctness of those decisions considered. In *Lyburn v. Warrington* (a), the action was upon a deed, by which the plaintiff covenanted to give up his trade to the defendant, and to allow him to carry it on in his house for ten years, the defendant paying 1000*l.* for the fixtures, &c., at the time of executing the deed, and covenanting to pay 1000*l.* per annum for ten years. It was objected, on the part of the defendant, that the deed ought to bear an ad valorem stamp, under the 48 Geo. 3, c. 149, which imposes an ad valorem duty on every conveyance “upon the sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any title, right, interest, or claim in, to, out of, or upon any lands, tenements, rents, annuities, or other property.” Lord *Ellenborough*, C. J., held that the deed did not require such stamp, and he said—“The agreement is, that the defendant shall have

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(a) 1 Stark. N. P. 162.

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these as auxiliary to the carrying on the business; and since there is no mention of any distinct substantive property exclusive of the trade, I cannot think that, in fair construction, the case falls within the operation of the Act." In *Warren v. Howe*(a), it was held that an assignment by indenture of a judgment debt is not an assignment of property within the meaning of 55 Geo. 3, c. 184, Schedule, Part 1, tit. "Conveyance," and therefore does not require an ad valorem stamp, but must have the ordinary deed stamp. *Abbott*, C. J., said, "It happens in this case, that the ad valorem duty is less than that which would have been payable in respect of the common deed stamp, but in most cases the former duty is higher. Whether this clause of the statute, requiring the ad valorem duty, be cumulative or not, it is unnecessary to decide in this case, for we are all of opinion that a judgment debt is not property within the meaning of the clause. The words are 'conveyance of any right, title, interest, or claim to any lands, tenements, rents, annuities, or other property, for or in respect of the deed whereby the lands or other things sold shall be conveyed to the purchaser.' The statute enumerates things which are the subject of sale, and which are usually converted into money; and I think that the expression 'other property' applies only to property of the same description as that previously mentioned, viz. such property as is usually the subject of sale, and may be converted into money. Now a judgment debt is not a property of that description. It clearly does not fall within the other clause which has been adverted to, because it is not a conveyance of property in trust for sale." In *Belcher v. Sikes* (b), where two persons, who had entered into certain contracts with the Victualling Office, agreed to dissolve partnership, and executed a deed, whereby one agreed to assign to the other all his interest in those contracts, all debts due to the concern, and all his share of the

(a) 2 B. & C. 281.

(b) 6 B. & C. 234.

partnership property, and the other agreed to pay him 50,000*l.*, at which sum his share and interest was valued, it was held that this was not a sale of *property* within the meaning of the 48 Geo. 3, c. 149, and did not require an *ad valorem* stamp. Lord *Tenterden*, C. J., said, "If the case of *Warren v. Howe* was rightly decided, this rule must be made absolute, for in principle it cannot be distinguished from this case. As at present advised, we all think that the subject-matter of the contract was not *property* within the meaning of the statute; but, as the case must go to a new trial, the parties may, if they please, raise the question in such a manner as to obtain a more solemn decision." The term "*property*," found in this clause of the Act, is to be taken as being *ejusdem generis* with the other terms "*lands, tenements, rents*," &c.; and it must be a matter which is capable of being transferred. A contract to transfer a goodwill could not be enforced even by a Court of Equity: a goodwill is a mere possibility, which, as such, cannot be the subject of an assignment. Now, although the parties to this deed use the word "*assignment*," still, inasmuch as a goodwill cannot be assigned, the language used has no legal operation. The deed, then, must be read as if the terms "*assign and transfer*," so far as they have reference to the professed assignment and transfer of the goodwill, were struck out. Upon this point the case of *Phillips v. Morrison*(*a*) is an authority. In *Blandy v. Herbert*(*b*), it was held that the assignment of a policy of assurance was not a conveyance of "*property*" within the meaning of those words in the 55 Geo. 3, c. 184, Sched. Part 1. And upon an analogous principle, it has been decided that the future half-pay of an officer is a matter which is not capable of being transferred: *Lidderdale v. Duke of Montrose*(*c*). [*Parke*, B.—Does not the recent case of *Caldwell v. Dawson*(*d*), where this Court

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(*a*) 12 M. & W. 740.
 (*b*) 9 B. & C. 396.

(*c*) 4 T. R. 248.
 (*d*) 5 Exch. 1.

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held that an assignment of a policy of assurance as security for a debt, with a proviso for redemption on payment, is a mortgage within the 55 Geo. 3, c. 184, Sched. Part 1, in effect overrule the earlier cases now cited and relied upon?] That decision proceeded upon the language of the clause in the schedule of the Act under the head of "Mortgage," which does not contain the same qualifying terms as those which are to be found under the head of "Conveyance." [*Parke, B.*—Nevertheless, it was there held that a policy of assurance was "property" within the meaning of that clause.] In that clause the term "property" must be taken in its most unlimited sense, the term "whatsoever" being added. There is nothing there to limit the word to a subject which is capable of being transferred. The onus of shewing the duty to be payable is cast upon the Crown; and it must also be shewn that duty is payable, not only upon those instruments which in fact transfer something, but upon those also which do not in fact transfer anything, although they affect to make a transfer. The appellants, therefore, are not chargeable with the ad valorem duty of 100*l.* upon this deed.

Phinn for the Crown.—Goodwill is property within the meaning of this clause, and as such is capable of being conveyed. The true definition of the term "property" is not easily to be arrived at. It may be said to be anything which is capable of being appropriated and transferred. To use the words of Horace,—

"tanquam

Sit proprium quidquam, puncto quod mobilis horæ
 Nunc prece, nunc pretio, nunc vi, nunc sorte supremâ
 Permutet dominos, et cedat in altera jura"(a).

[*Martin, B.*—If goodwill be not property, it is difficult to say what it is.] The parties themselves treat it as a matter that is worth 20,000*l.* The authorities, when consider-

(a) Hor. Epist. Lib. 2, Epist. 2, v. 171.

ed, are in favour of the duty being payable. In *Warren v. Howe*, the transaction was a mortgage, and consequently, according to the appellants' argument, it cannot be taken to govern this case. But if that view of it be not the true one, and that case is to be considered as a decision under the clause "Conveyance," then the recent decision of *Caldwell v. Dawson* directly overrules it. In Courts of Equity goodwill is treated as property, there being a distinction between goodwill in professional and in commercial partnerships. In a note to Williams on Executors, Vol. 2, p. 1410, it is said—"With respect to the goodwill of a business in which several are parties, it seems that, as to a partnership between professional persons, on the death of one, the goodwill shall survive to the other, although the deceased paid a large premium on entering into the partnership: *Farr v. Pearce*(a). But whether this survivorship of the goodwill exists in the case of commercial partnerships is not clear. In *Hammond v. Douglas*(b), Lord Loughborough determined that the goodwill of a trade carried on in partnership without articles survives, and is not partnership stock. But in *Crawshay v. Collins*(c), Lord Eldon doubted the propriety of that decision. See also *Featherstonhaugh v. Fenwick*(d). And *Worral v. Hand*(e) might be cited as an authority, that goodwill is assets in the hands of the executor; but there the executor had received the money. The plaintiff proved that the intestate was a publican, that for some time after his death the defendant lived in the house, and afterwards sold the goodwill of the trade for a sum of money. On an objection by the defendant's counsel, that this money was not assets in the hands of the defendant, Lord Kenyon, C. J., said it was assets in her hands, though she was tenant at will after the death of the intestate. In the Court of Chancery, his Lordship said, it

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(a) 3 Madd. 78.

(d) 17 Ves. 298.

(b) 5 Ves. 539.

(e) 1 Peake N. P. 74.

(c) 5 Ves. 227.

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was the daily practice to consider all beneficial interests, such as renewable leases and the like, as assets, and to charge the representative with the money arising from them, and this was analogous to those cases. It is therefore submitted, that goodwill falls within the term "property."

Hindmarch replied, and *Phinn* availed himself of the right on behalf of the Crown to a general reply.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B., (after stating the facts of the special case, his Lordship proceeded:)—We are of opinion that the assignment of the share of the goodwill of the trade in this case is an assignment of property within the meaning of the Stamp Act, and liable to ad valorem duty.

The 55 Geo. 3, c. 184, Sched. 1, imposes the ad valorem duty on "the sale of any lands, tenements, rents, annuities, or other *property*, real or personal, heritable or moveable, or of any right, title, interest, or claim in, to, out of, or upon any lands, tenements, rents, annuities, or other property; that is to say, for and in respect of the principal or only deed, instrument, or writing, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser or purchasers, or any other person or persons by his, her, or their direction" (a).

If we were for the first time to construe this clause, we do not feel any doubt that it was meant to apply to every sale for a sum of money of any subject of property—of that which belonged to a person exclusive of others, and which

(a) The language of the recent Stamp Act, 13 & 14 Vict. c. 97, Sched. tit. "Conveyance," is the same.

could be the subject of bargain and sale to another. The trade, or goodwill of a trade, sometimes enhances the value of real property, as a well-accustomed tavern or shop will, on account of the habit of persons to frequent it, sell for much more, and the duty on a conveyance of the place where the business is carried on ought pro tanto to be augmented; and very frequently the goodwill of a business or profession, without any interest in land connected with it, is made the subject of sale, though there is nothing tangible in it: it is merely the advantage of the recommendation of the vendor to his connexions, and his agreeing to abstain from all competition with the vendee. Still it is a valuable thing belonging to himself, and which he may sell to another for a pecuniary consideration. And we think no judicial construction has been put on the Act by decided cases by which we are bound.

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In the case of *Warren v. Howe* (a), the Court decided that an assignment of a judgment debt did not require an ad valorem stamp as a mortgage of property, because it did not fall within the definition of a mortgage in the Stamp Act, and that it was not within the clause as to conveyance, for that only applied to such descriptions of property as are usually the subject of sale. Now the goodwill of a trade does fall within that description.

Afterwards, in *Blandy v. Herbert* (b), where there was an assignment of a policy of assurance on which no loss had occurred, Lord Tenterden also held that it could not be considered as "property" within the meaning of the 1st clause as to conveyance.

In the case of *Caldwell v. Dawson* (c), this Court held that the policy was property within the clause as to mortgage; and, on contrasting the two clauses, though one differs a little from the other, every description of property is meant to be included in both.

(a) 2 B. & C. 281.

(b) 9 B. & C. 396.

(c) 5 Exch. 1.

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Since that case, we do not doubt that the assignment of a judgment debt or policy of assurance is within both the one clause and the other.

In the case of *Belcher v. Sikes* (a), where two persons agreed to dissolve partnership, and one to assign all his interest in certain contracts, and all debts due to the concern or partnership, and that the share of one should be deemed to be 50,000*l.*, 30,000*l.* of which had been paid, and the action was brought on a covenant to pay the remainder, the Court held, entirely on the authority of *Warren v. Howe*, that this was not property within the meaning of the Act 55 Geo. 3; but if the case was to go to a new trial, Lord *Tenterden* said the point might be more solemnly raised.

As the case of *Warren v. Howe* has been in effect overruled, this case cannot be considered as an authority.

The case of *Lyburn v. Warrington* (b) is the only other authority to be considered. There there was an agreement that the plaintiff should relinquish his trade as a butcher in favour of the defendant, who was to be admitted into the house then occupied by the plaintiff, the business to be carried on in the plaintiff's and defendant's names for ten years, the defendant to have possession of all the house but one room, and the fixtures. There was a covenant to pay 1000*l.* down, and 1000*l.* by ten quarterly payments. The objection was taken, that an ad valorem stamp was required, under 48 Geo. 3, c. 149 (which is in similar words), "because, since the possession of the house was to be given for ten years, and the fixtures included in the transaction, it was to be considered as a sale of *those interests*." Lord *Ellenborough*, at Nisi Prius, held that, as the house and fixtures were to be auxiliary to carrying on the business, and as there was no mention of any distinct substantive property exclusive of the trade, the case did not fall within that clause of the Stamp Act.

(a) 6 B. & C. 234.

(b) 1 Stark. 162.

It is clear that this case was never presented to his Lordship's mind as the purchase and sale of "goodwill." We cannot, therefore, consider it as an authority of any value on this question.

We think that goodwill falls under the description of "property." Were it otherwise, in cases where the goodwill operated as an increase of the value of real property, as in the sale of a well-accustomed shop, the revenue would be easily defrauded, by dividing the price of the real estate and the goodwill into two portions, and paying the duty only on the former part.

Judgment for the Crown.

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SANVILLE v. THE COMMISSIONERS OF INLAND REVENUE

June 13.

THIS was a case stated by the Commissioners of Inland Revenue, pursuant to the 13 & 14 Vict. c. 97, s. 15, to enable S. L. Sanville, Esq., to appeal to this Court against the determination of the Commissioners as to the stamp duty chargeable upon the deed hereinafter mentioned.

The deed, dated the 31st of October, 1853, was made between S. L. Sanville, of the first part; L. Oppenheim and Sophie his daughter, an infant, of the second part; and A. Salomons, E. Bright, and H. Oppenheim, of the third part. It recited, that the said S. L. Sanville was entitled to a policy of assurance on his own life, effected in his own name with "The United Kingdom Life Assurance Office," dated the 6th of December, 1852, for the sum of 4,000*l.*, and at the annual premiums thereafter specified; that a marriage had been agreed upon, and was intended shortly to be solemnised, between the said S. L. Sanville and Sophie Oppenheim; and upon the treaty for that marriage, it was agreed that the said policy should be assigned in manner and upon

The assignment to trustees of a marriage settlement, of a policy of insurance effected on the settlor's life for a sum named, and all monies assured or to become payable by or under the policy, is not liable to the payment of ad valorem duty under the 13 & 14 Vict. c. 97, Sched. "Settlement," as being a deed whereby any definite and certain principal sum of money is settled.

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the trusts thereafter declared; and that it was by the indenture witnessed, that, in pursuance of the said agreement, and in consideration of the said intended marriage, the said S. L. Sanville did thereby assign unto the said A. Salomons, E. Bright, and H. Oppenheim, their executors, administrators, and assigns, all that the hereinafter recited policy of assurance, and all monies assured or to become payable by or under the said policy, and the full benefit thereof, and all the estate and interest of the said S. L. Sanville in the said premises, to hold the same unto the said A. Salomons, E. Bright, and H. Oppenheim, their executors, administrators, and assigns, in trust for the said S. L. Sanville until the said intended marriage; and after the solemnisation thereof, upon trust that they the said trustees should, after the decease of the said S. L. Sanville, compel payment of and receive the said sum of 4000*l.*, and other the monies (if any) to become payable under the said policy, and should, in case the said S. L. Sanville should die in the lifetime of the said Sophie Oppenheim, hold the said sum of 4000*l.*, and such other monies (if any) as aforesaid, in trust for, and should pay the same unto, the said Sophie Oppenheim, her executors, administrators, and assigns absolutely; but in case the said S. Oppenheim should die in the lifetime of the said S. L. Sanville, then the said trustees or trustee should hold the said sum of 4000*l.*, and such other monies (if any) as aforesaid, upon trust to invest the same in their or his names or name, in or upon all or any one or more of the securities following, (that is to say,) the public funds &c, in trust for the child or children &c. The deed, after the usual provisions for the expected issue of the marriage, contained a covenant whereby Sanville covenanted with the said trustees that, in case the said intended marriage should be solemnised, he would not do anything whereby the said recited policy, or any new policy to be effected as thereafter mentioned, might become void or voidable, or the said trustees or trustee be hindered from receiving all or any of the mo-

nies assured or to become payable under the same; and that, if the said recited policy, or any such other policy, should become void, the said S. L. Sanville would immediately effect a new policy or policies on his life, in the names of the said trustees, for a sum not less in the whole than the sum of 4000*l.*, in some office to be approved of by them, and that every such new policy, and the monies to become payable under the same, should be subject to the same trusts as were therein contained and declared concerning the said existing policy of assurance and the monies to become payable under the same; and that he would from time to time pay the annual premiums thereinbefore specified, and any other premiums or sums for the time being necessary for keeping on foot the said existing policy, or any policy to be effected as aforesaid, on the first day on which the same respectively ought to be paid, and forthwith deliver the receipt for the same to the said trustees; and that he, his executors, administrators, or assigns would, on demand, pay to the said trustees all monies (if any) which should be expended by them in keeping on foot the said existing policy, or effecting or keeping on foot any new policy in lieu thereof, with interest thereon at the rate of 5*l.* per cent. per annum from the time or respective times of the same having been expended. And it was thereby declared that, until such monies as last aforesaid should be repaid with interest, the said existing policy, and any new policy to be effected as aforesaid, and the monies to become payable under the same respectively, should be charged with the payment thereof to the said trustees. And it was provided, that the said trustees should in nowise be bound or required to keep on foot the said existing policy, or to effect or keep on foot any new policy in lieu thereof; and that any neglect by them to enforce the covenants thereinbefore contained on the part of the said S. L. Sanville should not be considered a breach of trust, and that they should not be in anywise responsible for such neglect, nor for the said existing policy

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or any new policy in lieu thereof becoming void by any means whatsoever.

The deed contained provisions declaring the receipts of the trustees for any of the trust monies effectual discharges, and authorising them to compromise or refer to arbitration or otherwise arrange any action, suit, dispute, or demand, and generally to act in relation to the said trust premises as absolutely as if they were the absolute owners thereof, without being responsible for loss occasioned thereby; and for the appointment of new trustees; and for indemnifying all such trustees.

The case then stated, that the deed was presented by Sanville to the Commissioners for their opinion as to the stamp duty chargeable thereon, and that they were of opinion that the deed was chargeable under the statute with the ad valorem duty of 10*l.* as a settlement of a sum of 4000*l.*, and with a progressive duty, &c.; with which determination Sanville having declared himself dissatisfied, this case was stated by the Commissioners under the statute.

The question for the opinion of the Court was, whether the deed was chargeable with any, and, if with any, with what amount of ad valorem stamp duty.

The case was argued in the present Term (June 10) by

P. Francis for the appellant.—The deed is not liable to any ad valorem duty. This is not a settlement of “any *definite and certain* sum of money” within the meaning of the 13 & 14 Vict. c. 97, Sched. “Settlement”(a). The state-

(a) The schedule is as follows: —“ Any deed or instrument, whether voluntary or gratuitous, or upon any good or valuable consideration other than a bona fide pecuniary consideration, whereby any *definite and certain principal sum* or sums of money (whether charged or chargeable on lands or other hereditaments or heritable subjects or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any *definite or certain* share or shares in any of the government or parliamentary stocks or funds, or in the stock and funds of the Gover-

ment of the sum of 4000*l.* does not render the deed the settlement of a certain or definite sum. It may be worth little, or even nothing. Several cases may be cited to shew the meaning which has been attached to the words "certain and definite." In *Lopez v. De Tastet*(a) a verdict was obtained for 37,000*l.*, and a new trial was granted upon the defendant procuring a bond of Glyn & Co. to secure the damages and costs to be recovered; and it was there held, that duty was not payable upon that instrument under the 55 Geo. 3, c. 184, the words of that statute being "Bond in England and personal bond in Scotland given as a security for any definite and certain sum of money." The authority of that case was acted upon in *Annandale v. Pattison*(b), and in *Hughes v. King*(c). In the latter case Lord *Ellenborough*, C. J., said, that the bond which was given for the purpose of securing certain conditions to be performed by the vendor of a house, "could not be termed a security for a definite sum, when it was a penalty, which might cover a number of breaches, and where the sum itself was payable only upon a contingent event."—He was then stopped by the Court.

Pigott for the Crown.—This is a settlement of the sum of 4000*l.* at all events. [*Alderson*, B.—It is contemplated that other monies may become payable under the policy.]

nor and Company of the Bank of England, or of the Bank of Ireland, or of the East India Company, or of the South Sea Company, or of any other company or corporation, shall be settled or agreed to be settled upon or for the benefit of any person or persons, either in possession or reversion, either absolutely or for life or other partial interest, or in any other manner whatsoever: If such sum or sums of money, or the value of such share or shares in all or any

of the said stocks or funds, or of such one or more of the said articles as shall be so settled or agreed to be settled, or both such sum or sums of money, and the value of one or more of such articles together shall not exceed in the whole 100*l.*—5*s.* And if the same shall exceed 100*l.*, then for every 100*l.*, and also for any fractional part of 100*l.*—5*s.*"

(a) 8 Taunt. 712.

(b) 9 B. & C. 919.

(c) 1 Stark. 119.

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If that circumstance is to be taken as rendering the amount settled uncertain, the addition of such words would take any case out of this enactment, however definite might be the sum of money to be dealt with. The value of the sum settled is not in question. It was clearly the intention of the Legislature to impose the duty upon every settlement of a definite and certain sum of money, however the same be secured. Therefore, in the case of a sum settled or contracted to be settled, though payable in reversion, whether the money is in the settlor's personal possession or in the Bank, the result is the same. [*Alderson*, B.—Suppose A. B. was to settle the sum which 1000*l.* with the accumulation of interest at 5*l.* per cent. would bring, payable on the death of C. D., could that be considered as a settlement of a definite and certain sum of money?] If it were not within this clause, the Act might be evaded by providing that the sum settled should be payable with interest. Neither does a sum of money cease to be definite and certain on the ground that the fund out of which it is to be paid may fail. A difference is made between money and shares in this clause of the Act. In the case of shares, the duty is payable on their value. But in the case of a sum of money, the existing value of the principal sum settled, and the mode in which it is secured, are wholly immaterial. *Lopez v. De Tastet* was merely the case of a bond of indemnity. The language of this section is sufficiently large to embrace this case. *Caldwell v. Dawson*(*a*) is in favour of this construction.

The Court intimated that they would hear the appellant's counsel if they should find it necessary to do so.

Cur. adv. vult.

POLLOCK, C. B., now said:—In this case, by a deed, a

(*a*) 5 Exch. 1.

policy of assurance for 4000*l.* was assigned to trustees of a marriage settlement, together with all the sums that might become due upon it, on certain trusts, with reference to the ordinary purposes of a marriage settlement. The Commissioners of Inland Revenue had charged upon this deed the ad valorem duty of 5*s.* per cent. upon the whole amount of 4000*l.*, on the ground that it was a sum of money within the 13 & 14 Vict. c. 97, Sched. tit. "Settlement." [His Lordship read the schedule.] The case was argued by Mr. *Pigott* on behalf of the Crown, chiefly on the ground of its having been the intention of the Legislature to make liable every description of settlement; and his argument was, that if a sum of money be named as a matter to be settled, whether charged or chargeable on land or not, or if any shares in the public funds, or in the Bank or other corporation or company, be settled, such matter is liable to the ad valorem duty; that, in the case of a sum of money, the gross sum is liable; and that it is so whether it be receivable now or hereafter, whether absolutely or for life, or in any other manner whatsoever. The argument in short was, that this provision embraced every possible mode of settling any sum of money. On the other hand, it was argued by Mr. *Francis*, that the matter settled in reality was not a sum of money at all, and that the deed did not profess the transaction to be the settlement of a sum of money, but the assignment and transfer of a policy of assurance, (which was no doubt for 4000*l.*), and also of such further sums as might become due and payable under it; and that it was merely the transfer of a contract of insurance, to give the trustees under the marriage settlement, as such, the benefit of that contract. We are of opinion that the Commissioners of Inland Revenue were not justified in imposing the ad valorem duty on the instrument, on the ground that this description of transfer of a policy of insurance does not require any ad valorem duty. It may be (though I think upon that sub-

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ject a very considerable difference of opinion might well exist,) that it was the intention of the Legislature to impose this duty. I believe my learned Brothers are clearly of opinion that it was not. I am not quite so clear that it was not in the contemplation of the Legislature. It may be that the view presented by Mr. *Pigott* is so far correct, that the individual who framed this item in the schedule may have thought, when he inserted the terms "sum of money" and "shares in any company," that he had included every possible subject-matter in a settlement; but whether that be so or not, I entirely agree with the rest of the Court, that this case is not within the plain language and spirit of the Act, whether it is within the intention of its framers or not. If the language of the clause had been plain and explicit, if, for instance, the provision had been distinctly that any policy of assurance conveyed to trustees under any settlement, for any purpose whatever, in possession, reversion, absolutely, or in any other manner whatever, should be subject to the ad valorem duty, however apparently unequal the duty might have been, we should have had no choice; we must have held that the Commissioners were right. But if we are to look at the meaning as explained by what is probable with reference to the equality or justice of the duty imposed, it certainly does appear singular, as was observed by my Brother *Martin*, that there should be an ad valorem duty upon a transfer of a policy, of which possibly only one premium may have been paid, and which, therefore, in point of value, would not be worth one half perhaps of the small premium which might be paid upon the insurance. Now it is certainly true that a policy with a covenant for the payment of the premiums by some solvent and responsible person would be worth much more than a policy without such a covenant. But the Act of Parliament which creates this duty does not certainly in this clause (and I am not aware that it does in any other) impose an ad valorem duty upon a covenant to pay

a sum of money in that way. And one of the difficulties which Mr. *Pigott* would have to contend with would be this—that, apparently, if this policy were transferred, it would make no difference whether the settlor was under a covenant to pay the premiums, or whether the premiums were to be paid by the trustees from some other source. If merely the transfer of a policy of assurance for a certain sum is of itself to be considered as a settlement of a definite sum of money, it is immaterial by whom the premiums are to be paid. Then there would be an ad valorem duty charged on a matter which, in some instances, would not be worth a hundredth part of the value on which the duty would be charged.

In the course of delivering this judgment, I have given certain reasons for which I am alone responsible; but we are unanimously of opinion that no ad valorem duty was chargeable on this deed.

Judgment for the appellant.

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R. B., being
seised in fee of
five dwelling-
houses, on the

THIS was an action of ejectment to recover possession of a dwelling-house and premises at Hindley, in Lancashire. 8th of February, 1788, devised the same to his wife for her life, and after her death he devised two of the houses to his daughter Ellen, the wife of G. Fleming, for her separate use, with power to dispose of the same at her death amongst her children which should be then living; and after the death of his wife, the testator devised the three remaining houses to Ellen Bancks, the daughter of his late daughter, for her sole use, with power to dispose of the same among her lawful issue her surviving, and their heirs for ever, as she should think fit; and if either his said daughter or granddaughter should die without issue, he gave to the survivor what the deceased had before had, subject to the same limitations, and if both should die without issue them surviving, then the testator gave the property to be divided amongst his brothers and sisters, and others. In 1788, the testator died; when his wife entered into possession of the property, and enjoyed the same till her death in 1810. In 1798, Ellen, the widow of G. Fleming, intermarried with the defendant, and died in 1848, without issue. On the death of the testator's wife, the plaintiff, and the defendant in right of his wife, entered into possession of their respective shares of the property. By an indenture made, in 1843, between the defendant and his wife of the first part, J. C. of the second part, and J. Lord and W. Ackerley of the third part, after reciting the above facts, and that the defendant was seised in fee simple of the property, and that the said Ellen Ollerton was the testator's heiress-at-law, and that the defendant (her husband) was seised in fee simple of the property thirdly thereafter described, and that the defendant and his wife were indebted to the said J. Lord and W. Ackerley in a certain sum of money lent; it was witnessed, that the said J. Ollerton and Ellen his wife, in consideration of the money so lent, and of 10s. paid to them by the said J. C., the said E. Ollerton joining therein, as well to release and convey the said hereditaments firstly and secondly thereafter described, as to release and extinguish every right and title to dower which she might have with or out of the said hereditaments thirdly thereafter described, and to the intent that the then reciting indenture might operate and take effect by force or under the Act for rendering a release as effectual for the conveyance of freehold estate as a lease and release by the same parties, did grant and convey to the said J. C. and his heirs, first, those two dwelling-houses by the said will devised to the said Ellen Ollerton; and secondly, those three dwelling-houses by the said will devised to E. B. (the testator's grand-daughter), and all other lands &c. which the said Ellen Ollerton was entitled to as heiress-at-law of the said testator; and thirdly, certain premises belonging to the said J. O. &c., to hold the same, subject as to the premises secondly described to the life estate of the said E. B., to the said J. C. and his heirs, to the use of the said J. Lord and W. Ackerley for 1000 years, upon certain trusts; and after that term to such uses as J. Ollerton and Ellen his wife should by deed in writing appoint, and, in default of any such appointment, to the use of the survivor of them, as he or she might appoint by deed or direct by will, and, in the meantime, to the use of J. Ollerton and Ellen his wife during their joint lives, and the survivor of them; and it was in the said indenture declared, that the said term of 1000 years was so limited to the said J. Lord and W. Ackerley for the purpose of securing the repayment of the said sum so lent, with interest. Ellen Ollerton died without having made any appointment of the property limited by the settlement. This indenture was prepared by J. Lord and W. Ackerley, who were the only solicitors employed in the transaction, and was executed by J. Ollerton and Ellen his wife, and was acknowledged by the latter before the said J. Lord, one of the mortgagees of the said indenture, and one E. Woodcock, perpetual commissioners for taking the acknowledgments of married women, the said E. Woodcock not being in any manner interested in the transaction giving occasion for the said acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned. And the commissioners signed a certificate of their having taken such acknowledgment in the form pointed out by the 3 & 4 Will. 4, c. 74; which certificate, and the affidavit verifying the same, was filed of record, according to the rules of the Court of Common Pleas. In ejectment by Ellen Bancks to recover part of the premises devised to Ellen Ollerton:—*Held*, first, that the circumstance of the remainder de-

At the trial, before *Martin*, B., at the Liverpool Spring Assizes, 1853, a verdict was taken for the plaintiff, subject to the opinion of this Court on the following case:—

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The case stated that, on the 8th of February, 1788, Richard Banks, being seised in fee of the property in question, made his will, whereby, after charging his realty and personalty with the payment of his debts and funeral expenses, he gave and devised to Elizabeth his wife five dwelling-houses in Hindley for her natural life, and from and after her decease he gave and devised two of the said dwelling-houses to Ellen, the wife of Greaves Fleming, his daughter, for her separate use, with power to dispose of the same at her death amongst her children which should be living at the time of her death; and after the death of his said wife Elizabeth, he gave and devised the remaining three dwelling-houses to Ellen, the daughter of Ann Banks, his late daughter, deceased, for her sole use, with power to dispose of the same to or amongst her lawful issue her surviving, and their heirs for ever, as she should think fit. And if it did happen that his wife should die before his said grand-daughter Ellen should have attained the age of twenty-one, the testator's will was that the rents of the said last-mentioned dwelling-houses should go towards her education and maintenance; and if either Ellen his daughter or Ellen his grand-daughter should die without issue, then his will was that the survivor should have and enjoy that which was thereinbefore given to the deceased party for her own use, subject to the limitations thereinbefore

volving on Ellen Ollerton as heiress-at-law, at the same time that her life estate took effect under the will, did not operate as a merger of the life estate, so as to bar the contingent remainder which the plaintiff had in the property in question.

Secondly, that, assuming the deed of 1843 to have been properly executed by Ellen Ollerton, so as to pass her interest in possession and reversion, it operated to destroy the plaintiff's contingent remainder, since the union of the two estates was necessary to raise the uses limited by the deed, and consequently the life estate was thereby merged in the reversion in fee.

And thirdly, that inasmuch as it did not appear on the face of the certificate of the acknowledgment, that the J. Lord mentioned therein was the same J. Lord the mortgagee, the certificate could not be thus questioned, and the execution of the deed was valid (*a*).

(a) See the 17 & 18 Vict. c. 75, knowledge of Deeds by Married Women in certain cases." Doubts concerning the due Ac-

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mentioned; and if both should die without issue the surviving, the testator gave all the property in equal shares amongst his brothers, sisters, and others there mentioned.

The testator died in 1788, and Elizabeth Bancks his wife entered into possession of the five dwelling-houses, and enjoyed the same up to her death in 1810.

In 1798, Ellen, then the widow of Greaves Fleming, intermarried with the defendant, and died in 1848 without issue.

On the death of Elizabeth Bancks, the plaintiff and the defendant in right of his wife respectively entered into possession of their respective shares of the said hereditaments, and still hold possession of the same respectively.

By an indenture, dated 12th of May, 1843, and made between the defendant and his wife Ellen of the first part, John Caldwell of the second part, John Lord and William Ackerley of the third part, after reciting the said will of Elizabeth Bancks and his death, and that of his brother, his sisters and the other parties left in remainder, but that his grand-daughter Ellen was then alive and had never been married, and also reciting the death of Greaves Fleming and that his widow had married the said John Ollerton and that the testator died leaving one child only him surviving, viz. the said Ellen Ollerton, who was his heiress-at-law, and that the said John Ollerton was seised in fee simple of the property thirdly thereafter described, and that the said John Ollerton and Ellen his wife were indebted to the said John Lord and William Ackerley in 80*l.* for money lent, and that the said John Lord and William Ackerley had requested some security, and it had been agreed that the said hereditaments should be settled and assured in manner thereafter appearing: It was witnessed, that the said J. Ollerton and Ellen his wife, in consideration of 80*l.* lent to them by J. Lord and W. Ackerley and of 10*s.* paid to them by J. Caldwell, the said Ellen Ollerton joining therein as well to release and convey the

said hereditaments firstly and secondly thereafter described, as to release and extinguish every right and title to dower which she might have with or out of the said hereditaments and premises thirdly thereafter described, and to the intent that the then reciting indenture might operate and take effect by force or under the Act for rendering a release as effectual for the conveyance of freehold estate as a lease and release by the same parties, did grant, bargain, &c., and convey to the said John Caldwell and his heirs, first, those two dwelling-houses and premises by the said will devised to the said Ellen Fleming now Ollerton; and secondly, all those three dwelling-houses and premises by the said will demised to Ellen Bancks, and all other lands, &c., which the said Ellen Ollerton was entitled to as heiress-at-law of the said testator; and thirdly, certain premises belonging to the said John Ollerton, &c., to hold the same, subject as to the premises secondly described to the life estate of the said Ellen Bancks, to the said John Caldwell and his heirs, to the use of the said J. Lord and W. Ackerley for one thousand years, upon certain trusts, and after that term to such uses as John Ollerton and Ellen his wife should by deed in writing appoint, and in default of any such appointment to the use of the survivor of them, as he or she might appoint by deed or direct by will, and in the meantime to the use of J. Ollerton and Ellen his wife, during their joint lives and the life of the survivor of them; and it was thereby declared, that the said term of one thousand years was so limited to the said J. Lord and W. Ackerley for the purpose of securing the repayment of the said sum of 80*l.* with interest.

This indenture was prepared by John Lord and W. Ackerley, who were the only solicitors employed in the transaction, and was executed by J. Ollerton and Ellen his wife, and was acknowledged by the latter before the said J. Lord, one of the mortgagees of the said inden-

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ture, and one Edward Woodcock, perpetual commissioners for taking the acknowledgments of married women, the said Edward Woodcock not being in any manner interested in the transaction giving occasion for the said acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned. And the said commissioners signed a certificate of their having taken such acknowledgment in the form pointed out by the 3 & 4 Will. 4, c. 74; and such certificate, accompanied by the affidavit required for verifying the same, was subsequently filed, and is still of record, such affidavit being made by the said E. Woodcock in the form pointed out by the orders of the Court of Common Pleas at Westminster, of Hilary Term, 1834, as to the want of such interest or concern as aforesaid in the transaction by the said E. Woodcock.

The testator had two children only, viz. the said Ellen Ollerton and Ann Bancks, the latter of whom died in his lifetime and unmarried, and the plaintiff was her illegitimate and only child. The said Ellen Ollerton was the sole heiress-at-law of the testator, and she died without having joined with her husband in making any appointment of the property limited by the said settlement.

The action was brought to recover part of the premises devised by the testator's will to Ellen, wife of the defendant John Ollerton.

The questions for the opinion of the Court were, first, whether by the said will an estate in such last-mentioned premises, sufficient to maintain the present action, was given to the plaintiff on the death without issue of the said Ellen Ollerton; and secondly, if so, whether the deed of the 12th May, 1843, executed and acknowledged as aforesaid, defeated such estate.

If the Court should be of opinion that such an estate was given by the said will to the plaintiff on the death

without issue of the said Ellen Ollerton, and that such an estate was not defeated by the deed of the 12th May, 1843, the verdict for the plaintiff was to stand. But if the Court should be of opinion that no such estate was given, or that the estate given was defeated as aforesaid, the verdict was to be set aside, and a nonsuit to be entered in lieu thereof.

The case was argued last Term (May 1) by

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Knowles for the plaintiff.—The first question is, whether the contingent remainder in the estate in question, which the plaintiff had under the will of her grandfather, was destroyed by the circumstance of the remainder having devolved upon Ellen Ollerton as heiress-at-law at the same moment that her life estate took effect under the will, so as to operate as a merger of the life estate. Now *Plunket v. Holmes*(a) is an authority, that where the descent of the inheritance is immediate from the person by whose will the particular estate and contingent remainders are limited, the descent of the inheritance does not destroy the contingent remainders. [*Lee*, who appeared for the defendant, conceded this point.] The questions then are, first, whether the deed of 1843 was duly executed by Ellen Ollerton; and if it was, secondly, whether it operated so as to bar the contingent remainder which at that time the plaintiff had in the property in question.

First. The deed was executed by a feme covert before two perpetual commissioners, one of whom, John Lord, was mortgagee, and he and his partner were the only solicitors engaged in the transaction. The deed was therefore not duly executed, and is wholly void. The commissioners before whom a feme covert is examined act in a judicial character, and it is contrary to the clear principles of justice that a man should act as a judge in his own cause. If this

(a) Sir T. Raym. 28.

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form of proceeding were allowable, the husband of a feme covert might act as a commissioner upon the execution by her of such an instrument. Now the 3 & 4 Will. 4, c. 74, which is "An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple modes of assurance," by sect. 77, empowers a married woman, with her husband's concurrence, to dispose of her estate in lands, &c., as a feme sole. And the 79th section enacts, that every deed to be executed by a married woman for the purposes of the Act, with certain exceptions (that are immaterial here) must be acknowledged by her as her act and deed before a Judge, &c., or "two special commissioners to be respectively appointed" as thereafter is provided. The 84th, 85th, and 86th sections contain certain regulations as to the mode of making the acknowledgment, and as to the filing of the certificate of record. The 89th section, the language of which is important, after providing for the appointment of the officer with whom such certificates as aforesaid shall for the time being be lodged, proceeds to enact, that "the Court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the Court shall think fit touching the *mode of examination* to be pursued by the commissioners to be appointed under this Act, and touching the particular matters to be mentioned in such memorandums and certificates as aforesaid, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said Court as hereinbefore directed, and also of the fees or charges to be paid for taking acknowledgments of deeds and for examining married women, and for the proceedings, matters, and things required by this Act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations." It will be contended on the part of the

defendant, that a rule made by the Court of Common Pleas under this Act has been complied with. That rule orders, "that where any acknowledgment shall be made by any married woman of any deed under and by virtue of the said Act before commissioners appointed under the said Act, one at least of the said commissioners shall be a person who is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned" (a). It will be said on the defendant's behalf, that if one of the commissioners be not an interested party, this rule will be satisfied. Now the meaning of the rule is not very clear; but, according to its reasonable construction, it was intended to apply only to the commissioner who might be interested as *attorney or solicitor* for the party. At all events, the Court of Common Pleas had no power to make a person who is personally interested in the transaction a commissioner. If one of the commissioners may be an interested party, there is no reason why both should not be so. But this is opposed to law, inasmuch as the examination is a judicial act. When fines were levied, the examination of the married woman was held to be an act of that character: *Wilson on Fines*, page 22. It is also laid down in that work, that "a Judge or other person being conusee of a fine may not take the acknowledgment thereof himself, if he do the fine is void." The statute empowers the Court of Common Pleas to make orders as to the *mode* only in which the examination shall take place. [*Martin, B.*, referred to *Dimes v. Grand Junction Canal Company* (b), and *Sheppard's Touchstone*, page 9.] It will, however, be said, that inasmuch as the certificate of the taking of the acknowledgment is by the Act (3 & 4 W. 4, c. 74) directed to be filed of record, the objection to the validity of such acknowledg-

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(a) 10 Bing. 459.

(b) 3 H. L. Cas. 759.

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ment should be by application to the Court of Common Pleas for leave to take the certificate off the file. But the deed itself is void, and the estate does not depend upon the filing of the certificate. If the deed be void, the estate which the deed professes to convey does not pass [*Parke, B.*—The deed is not effectual unless the certificate be filed of record: *Jolly v. Hancock*(a). The question is, whether the fact of the certificate being of record precludes the defendant from taking this objection to the validity of the execution of the deed.] The feme covert did not act as a free agent, and consequently the execution of the deed by her is wholly void.

In the next place, assuming the deed to be valid, it did not operate as a merger of the life estate, and thereby destroy the contingent remainder which the plaintiff had. It is laid down as a general rule in *Fearne on Contingent Remainders*, page 340, that “where the union or coalition of the particular estate (except the circumstances of its being created by or arising under the same instrument or deed as the particular estate,) happens by the conveyance or act of the parties, the intermediate contingent remainders depending on such particular estate are destroyed.” That rule, however, applies to the case where the inheritance and the life estate being in different persons coalesce for the first time in some third party, in which case the life estate becomes merged. But where a party having both estates conveys them, there is no merger. The grantee takes the grantor’s estate with the same qualifications as it possessed in the hands of the grantor. There is no direct authority upon this point; but the late statute of the 8 & 9 Vict. c. 106, may be referred to as shewing the intention of the Legislature to preserve contingent remainders. Assuming, however, that the rule applies in all cases in which there is a conveyance of the inheritance, here the deed did not

(a) 7 Exch. 820.

convey the inheritance. It is a release to uses,—to the use of Lord and Ackerley for the term, and after that term to such uses as Ollerton and his wife should by deed appoint, and, in default of any such appointment, to the use of the survivor as he or she might appoint; and, in the meantime, to the use of Ollerton and his wife during their joint lives and the life of the survivor of them, their heirs, and assigns. The first use is only for the term, and the second is for the joint lives of Ollerton and his wife, and the survivor. But, until the decease of one, this is merely contingent; and when that happens, then it results to the use of the releasor, who is in of her old estate. That being so, there is no union of the life estate and the inheritance, and consequently the life estate is not merged. But it may be said, that the release to uses had such a seisin as would destroy the life estate. The releasee to uses, however, has no estate whatever, as he is considered to be the mere conduit pipe by which the estate immediately passes. The life estate, therefore, was sufficient to support the contingent remainder which the plaintiff has in the property in question.

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Lee (Atherton with him) contra.—The objection to the validity of the deed, on the ground that the examination of the feme covert was not duly taken, cannot be sustained. The statute 3 & 4 Will. 4, c. 74, and the rules made by the Court of Common Pleas in pursuance of that Act, have been faithfully followed. Those rules have been in operation for twenty years, and the validity of a vast number of titles might be brought into peril by such an objection as that now raised being successful. The statute 3 & 4 Will. 4, c. 74, ss. 80, 81, and 84, entrusted the Court of Common Pleas with a discretionary power to make rules regulating the practice of taking the acknowledgments of married women. The certificate, when filed of record, cannot, whilst it remains so filed, be questioned. [*Martin, B.*—Suppose that one of the signatures of the commissioners

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was forged, could not the acknowledgment be questioned.] An application ought first to be made to the Court of Common Pleas to take the acknowledgment off the file. [*Pollock*, C. B.—As in the case of a forged will, the probate, as long as it remains unrepealed, cannot be impeached in a temporal Court: *Allen v. Dundas*(a).] The certificate cannot be impugned except in the Court of Common Pleas: ss. 87 and 89. In a case of *In re Scholfield*(b), the Court of Common Pleas held, that the affidavit verifying the certificate of a married woman's acknowledgment of a deed might be made by one of the commissioners who took the acknowledgment, provided he was a practising attorney, and one of the commissioners had no interest in the affair.

In the next place, conceding that prior to the deed of 1843 there was no merger of the life estate, the argument, that by reason of the same party having both estates the deed did not merge the life estate, has no foundation whatever. The fee created by the deed must have seisin, and the whole estate passed by the conveyance, therefore the two estates vested in the releasee to uses, and consequently the estate for life which Mrs. Ollerton had under the devise was merged in the estate created by the deed. It is clear that the uses limited by the deed could not be supported except by the union of the two estates, and, consequently, that the lesser estate was thereby merged in the greater. The life estate being merged, the contingent remainder which the plaintiff had under the devise was destroyed: *Purefoy v. Rogers*(c), *Plunket v. Holmes*(d).

Knowles, in reply, contended that the execution of the deed might be impugned on the ground that the acknowledgment was not duly taken; that the filing of the acknowledgment of record did not give it the effect of a record; that many documents are so filed merely with a view to

(a) 3 T. R. 125.

(b) 3 Bing. N. C. 293.

(c) 2 Wms. Saund. 380, and notes.

(d) Sir T. Raym. 28.

their safe custody; and that, in the case of a forged will, if it appeared that the party whose will it purported to be were alive, the probate would be void, as the Ecclesiastical Court had no jurisdiction to grant it. Upon the effect of the deed, he cited *James v. Plant*(a).

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Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—(After stating the case, his Lordship proceeded):—

The only real question in this case is, whether the contingent remainder, which the plaintiff certainly had under the will of Richard Bancks, if Ellen Fleming, afterwards Ollerton, should die without lawful issue living at her death, was barred by the indenture of the 12th of May, 1843, executed by Ellen Ollerton, who was the heiress-at-law of the testator.

It was conceded by the defendant's counsel, that the circumstance of the remainder devolving on Ellen Ollerton as heiress-at-law, at the same time that her life estate took effect under the will by the death of the testator, did not operate as a merger of the life estate, so as to bar the contingent remainder; but it was contended by him, and we have no doubt properly, that if the deed was duly executed by Ellen Ollerton, so as to pass her interest in possession and reversion, its operation was to destroy the contingent remainder; for the union of the two estates was necessary to raise the uses limited by the deed, and the life estate was therefore merged in the reversion in fee.

The only question therefore is, whether the deed was duly executed, and the proper steps taken, so as to pass the interest of a feme covert. In order to effect this object, it was necessary, by the 79th section of the statute 3 & 4

(a) 4 A. & E. 749.

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Will. 4, c. 74 (the Act "for the Abolition of Fines and Recoveries, and for the substitution of more simple modes of assurance,") that the deed, upon its execution or afterwards, should be produced and acknowledged by her as her act and deed before a Judge of one of the superior Courts at Westminster, or a Master in Chancery, or before *two* of the perpetual commissioners, or two special commissioners; and, by section 80, the Judge, Master in Chancery, or commissioners, before they receive the acknowledgment, shall examine the married woman apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed; and, unless she does so, shall not permit her to acknowledge it, and the deed as to the married woman is void.

The deed in question was acknowledged before two perpetual commissioners, one of whom was Mr. Lord, the mortgagee; and he and his partner were the only solicitors employed in the transaction.

If there had been no other provision in the statute, this acknowledgment would not have been valid; for a commissioner could not act in his own case any more than a Judge; the statute requiring two commissioners, obviously means that they both should be commissioners who could legally act. But then a question was made, whether the rules of the Court of Common Pleas made in pursuance of the 89th section do not obviate this objection. That section provides, that the Court of Common Pleas shall make such orders and regulations as the Court shall think fit, touching the *mode of examination* to be pursued by the Commissioners to be appointed under that Act, and other matters.

Pursuant to this power, the Court of Common Pleas made general rules in Michaelmas Term, 1833, and again in Hilary Term, 1834, by which it was said to be provided that *one* of the commissioners might be a person interested.

We think this rule was not meant to apply to any but

those who are interested *as attorneys* for the parties. If it did apply to a party, we think that the rule to that extent would be void, as being beyond the powers given to that Court by the statute. This would be in effect an alteration of the statute itself. The authority given in the 89th section clearly extends to the mode of proceeding only.

But we need not decide this point, as we think that all question on the trial of an ejectment as to the validity of the conveyance is precluded by the certificate required by the 85th section, so long as it remains of record.

The 85th section directs, that there shall be a memorandum indorsed or written on the deed, signed by the Judge or commissioners who took the acknowledgment, and also a certificate of the taking of such acknowledgment, written or engrossed on a separate piece of parchment, in the form given by the Act, and signed by the same Judge or commissioners, and in that certificate the full age of the feme covert, her competence, and separate examination and consent are all stated; and by the 85th section, this certificate, with an affidavit verifying the signatures, is to be deposited with an officer of the Common Pleas, who is to examine it; and if all the requisites have been complied with, the officer is to cause the certificate and affidavit to be *filed of record* in the Court of Common Pleas.

Then the 86th section provides, that when the certificate, &c., is filed of record, the deed so acknowledged shall, so far as regards the disposition, release, surrender, or extinguishment thereby made by any married woman, whose acknowledgment shall be so certified concerning any lands or money comprised in such deed, *take effect* from the time of its being acknowledged, and the subsequent filing of such certificate as aforesaid shall have relation to such acknowledgment.

This certificate is an essential part of the title of a person claiming under the deed, and until it is filed of

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record no title passes, as was decided by this Court in the case of *Jolly v. Hancock* (a). When it is filed, the deed operates from the time of the acknowledgment.

The 88th section enacts that, after the filing of the certificate, the officer shall deliver at any time copies of the certificate signed by him, and every such copy shall be received *as evidence* of the acknowledgment of the deed to which it refers. It is clear from that clause, that no other evidence is necessary to prove the acknowledgment of the feme covert than a signed copy of the certificate, or the certificate itself.

But we think that the Legislature must have intended that it should not only be evidence, and sufficient evidence, but also *conclusive* evidence of the acknowledgment. By requiring the affidavit to be filed of *record*, it must be inferred that it was intended that it should have the property of a record, and be conclusive evidence of the fact stated, more especially when it is considered that it is a substitute for the chirograph of a fine, which was conclusive evidence of the acknowledgment; and it is of the greatest importance to the security of titles to real estate, that it should not be a question for the jury, whenever the title under the deed comes in question, whether a judicial inquiry was properly instituted before proper persons and properly conducted.

The mischief would be enormous if such inquiries before a jury were permitted; and we cannot doubt that it was the purpose of the legislature to prevent them by the enactments to which we have referred.

If the certificate is not warranted by the Act, and ought not to have been given, the remedy is by an application by the party aggrieved to the Court of Common Pleas to quash the certificate and take it off the file, as having been improperly or irregularly made. That Court

(a) 7 Exch. 820.

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will exercise its discretion in granting or refusing the application, according to the circumstances under which it is made, the nature of the interest affected, the length of the acquiescence of the party complaining, and every other material matter, and they will then do complete justice.

If the defect appeared on the face of the certificate itself compared with the deed, as, for instance, if it appeared by that comparison that the party to whom the conveyance was made was one of the commissioners, it may be that the objection as to the invalidity of the certificate might be taken on a trial at law where the title was in question. But that is not the present case, for the identity of John Lord the commissioner and John Lord the mortgagee does not appear.

The certificate is therefore, on the face of it, unobjectionable, and until set aside by the Court of Common Pleas must be considered as valid and operative.

The defendant is therefore entitled to our judgment.

Judgment for the defendant.

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June 12.

BRAYAN v. McDONNELL.

Upon the trial of an action for the recovery of a sum of money paid as a deposit on the purchase of an estate, upon the ground that the plaintiff was, at the time of the transaction, a lunatic, and incapable of contracting, which the defendant knew, the sole issue being whether at the time of such transaction the defendant knew the fact of the plaintiff's insanity: *Held*, that the conduct of the plaintiff, upon various occasions, both before and after the date of the transaction, was admissible in evidence to shew that the plaintiff's malady was of such a character as would make itself apparent to the defendant at the time he was dealing with him.

THE declaration was for money had and received, for interest, and on account stated (a).—Plea (in substance), that the plaintiff had entered into a contract with defendant for the purchase, from the latter, of an estate; that the sum of 415*l.* was then paid by the plaintiff as a deposit on the purchase; and that the rest of the purchase-money was to be paid on the vendor's conveying the estate within a certain time; that the defendant was ready to complete the purchase by conveying the estate; but that the defendant refused to complete the purchase, whereby the said sum of 415*l.* became forfeited.

Replication, that at the time of the plaintiff's so contracting, and of the defendant's receiving the said money, the plaintiff was a lunatic and of unsound mind, and thereby incapable of contracting, and that the contract was of no benefit to him, of all of which the defendant had notice.

Rejoinder, that the defendant did not, when the plaintiff made the contract and paid the money, know that the plaintiff was a lunatic, or of unsound mind, and incapable of contracting; but that the contract was made with the plaintiff fairly and in good faith, believing that he was able to understand the same.—The surrejoinder traversed this allegation.

At the trial, before *Wightman*, J., at the last Hereford Assizes, it appeared that the action was brought to recover the sum of 415*l.* which had been paid to the defendant by the plaintiff as a deposit upon the sale of an estate which the plaintiff had contracted to purchase from the defendant. The ground upon which the deposit was sought to be recovered back was, that at the time of the contract the plaintiff was a lunatic and incapable of contracting, and that the

(a) This case first came before the Court on demurrer; see Vol. 9, p. 309.

defendant or his agent was cognisant of that fact. It appeared that the contract was entered into between the plaintiff and the defendant's agent in the private room of an inn, when the deposit was paid by a cheque given by the plaintiff, and which was duly honoured. This transaction took place in the month of November; and there was no doubt that at that time the plaintiff was of unsound mind, and incapable of knowing what the nature of the transaction was. On the part of the plaintiff evidence was offered to shew that on several occasions in the preceding month of August, and in October also, he had so conducted himself as to lead to the inevitable conclusion that he was then insane. And further evidence of a similar description was offered of his conduct after the transaction. On the part of the defendant, this evidence was objected to as inadmissible. The learned Judge, however, received it, and a verdict was found for the plaintiff for the amount claimed.

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Whateley having obtained a rule nisi for a new trial on the ground of the improper reception of this evidence,

Kenting and *Skinner* now shewed cause.—Although it may be taken to be an admitted fact upon the record, that, at the time of the alleged contract, the plaintiff was of unsound mind and incapable of contracting, still the correct mode of establishing the disputed fact of the defendant's knowledge of such unsoundness of mind was by the production of evidence of the plaintiff's conduct upon the various occasions before and after that transaction. If a person exhibits palpable marks of insanity immediately before and immediately after any particular event, such conduct may be adduced not only with the view of shewing that at that particular time the party was insane, but also that the fact must have been evident to a person having intercourse with him. These facts form links in the chain of the narrative, which are properly laid before the jury in support of the issue. Assuming the fact of the plaintiff's insanity to be taken as ad-

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mitted on the record, still that does not preclude the defendant from establishing the fact by evidence, in order to give the jury the power to draw other inferences from it. In *Edmunds v. Groves* (a), Alderson, B., says, "An admission on the record is merely a waiver of requiring proof of those parts of the record which are not denied, the party being content to rest his claim on the other facts in dispute; but, if any inferences are to be drawn by the jury, they must have the facts from which such inferences are to be drawn proved like any other facts." And further, if this evidence was immaterial to the issue, its reception would not afford any ground for a new trial.—They were then stopped by the Court.

Whateley, Gray, and Phipson shewed cause.—The fact of the plaintiff's insanity at the time the contract was entered into being admitted, the only matter in issue was, whether the defendant or his agent was cognisant of the fact. Any evidence not directed to the particular time of the transaction was inadmissible. There is no doubt that the evidence would have been legitimate if the plaintiff's insanity had been in dispute; but it had the effect of withdrawing the attention of the jury from the question in issue, and it is probable that it prejudiced their verdict. The selection of various periods of the plaintiff's life, long antecedent to the transaction, was a hardship upon the defendant, who had neither the means of knowing that such evidence would be produced, nor the power of meeting it. If this be true as regards the evidence of acts prior to the transaction, it applies with much greater force to the evidence of the plaintiff's conduct after that event. Even had the defendant been aware of the plaintiff's subsequent conduct, such knowledge could not be treated as affording any evidence of his having been aware of the plaintiff's state of mind on any prior occa-

(a) 2 M. & W. 645.

sion. If evidence of this character were held admissible, where could the line be drawn? [*Alderson*, B.—That is the question. If evidence of the man's acts just before and just after the bargain would be allowable, why should not evidence of his demeanour some time before and after be equally unobjectionable? It is only a question of degree. If the issue had been whether or not the defendant on a particular day knew that the plaintiff was suffering from a fever, could not it have been shewn that, on the day before and on the day after, the plaintiff had the symptoms of fever so visibly apparent upon him, that it could escape the observation of no one who chose to use his eyes?]

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POLLOCK, C. B.—We are all of opinion that the rule ought to be discharged. It was moved on two grounds: first, that this evidence ought not to have been received; and secondly, that it did not sustain the issue which the jury found. As to the latter point, the learned Judge reports that he was satisfied with the verdict, which, according to the usual practice of the Court, is sufficient to justify us in disposing of the rule on this point. I may also add, that I perfectly agree with the verdict. There is no doubt that the evidence was proffered by the plaintiff's counsel at the trial for the purpose of shewing that the nature of the insanity under which the plaintiff laboured was such that the defendant must necessarily have been aware of its existence. It has been argued, that the evidence of the plaintiff's conduct after the transaction had no tendency to prove the issue. I have been at a loss to see any difference between the evidence of what took place before and afterwards. The evidence was not offered to shew that the party was insane, but that his malady was of such a description as must have been obvious to any person having intercourse with him. The result of the cause may have been influenced and the defendant's case may have been prejudiced by it, but there were other circumstances which

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would weigh in the plaintiff's favour; and, looking at all the evidence in the case, I am not surprised that the jury arrived at the verdict which they returned.

ALDERSON, B., concurred.

PLATT, B.—I am of the same opinion. The evidence was most material. The character of the plaintiff's insanity before and after the particular transaction was most important, as evidence that the fact of his insanity must have been known to a party dealing with him; and for this purpose, what could be more important than evidence of the apparent state of his mind the day before and the day after? What objection could there be to proof of the plaintiff's demeanour in a previous week? The question is one of degree only, but the evidence is nevertheless admissible. The further off the evidence is carried, the weaker it may be; but it is still evidence, though not *proof* of the fact of knowledge.

MARTIN, B.—I am clearly of opinion that this evidence was properly admitted. This is a matter depending not so much upon any rule of law as upon the rule of common sense, by which a party is entitled to submit all such facts to the jury as are reasonably relevant to the issue. The plaintiff had a right to prove every fact which would lead the jury to the particular conclusion to which he sought to lead them. That conclusion was, that on the particular evening in question, when the bargain was concluded, it must have been apparent, from the plaintiff's demeanour, that he was then insane. If the plaintiff's counsel were at liberty to prove acts indicative of his insanity shortly before and shortly after the transaction, they might lay before the jury evidence of what his demeanour was on other occasions. The question is one of degree only. If this had been a matter of private inquiry, the question would naturally be how this

person had conducted himself on other and different occasions. If a solitary instance of insanity, which had manifested itself a year before, had been brought forward, it would in all probability not have influenced the issue. For my own part, I never entertained any doubt upon this question, and I regret that the rule was granted.

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Rule discharged.

SANDERSON v. PROCTER.

June 15.

IN this case *Lush* had obtained a rule calling on the defendant to shew cause why the plaintiff should not have his costs taxed under the 15 & 16 Vict. c. 54, s. 4.

The cause had been tried in one of the superior Courts, and the plaintiff had recovered a debt of less than 20*l*. A summons was taken out before *Alderson*, B., at Chambers, for an order allowing the plaintiff his costs, on the ground that it was a case in which the superior Court had concurrent jurisdiction,—as the plaintiff and the defendant dwelt more than twenty miles apart. The learned Judge, after hearing both sides, refused to make any order, and indorsed on the summons “no order,” it appearing that the residence of the defendant’s wife was within twenty miles of the plaintiff’s residence; holding, under the circumstances, that the residence of the wife was the residence of the husband.

Where a summons was taken out before a Judge at Chambers for an order for the plaintiff’s costs, on the ground that the case was one in which the superior Court had concurrent jurisdiction with the county court, and the Judge, on the facts, refused to make the order: upon a like application to the Court, affidavits in addition to those adduced at Chambers may be used.

Quain now shewed cause, and was proceeding to read an affidavit made by the defendant, which had not been read before the learned Judge at Chambers; when

Lush, contra, objected.—The affidavit cannot be read. It is an invariable rule of practice, that new materials cannot be used upon an appeal against the decision of a

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Judge at Chambers. [*Martin*, B.—In *Gibbons v. Sanderson* (a), which was an application to the Court to read an order for the arrest of the defendant under the 1 Vict. c. 110, fresh affidavits were allowed to be used. *Sanderson*, B., there says, “I entertain no doubt that both parties are at liberty to use fresh affidavits. The object of the Court must be to ascertain all the facts correctly, that it may determine upon satisfactory grounds whether the Judge’s order is to be set aside or not. Suppose, after making of the order, it were discovered that the affidavits used before the Judge were false, ought not that circumstance to be brought before the Court?” *Pollock*, C. B.—The parties must bring the same affidavits that were used before the Judge; but it does not follow, as a logical deduction, that they may not bring more. It would be bad logic, and not justice, to hold that they could not; for what we seek to ascertain is the truth.] The decision adverted to turned upon the particular words of the statute.

POLLOCK, C. B.—We rule that the fresh affidavit must be read. The plaintiff might have made one also, if he had been so minded.

The rest of the Court concurred (b).

The case then proceeded, and the affidavit was read; and upon it principally, the rule was made absolute (c).

(a) 11 M. & W. 173.

(b) *Parke*, B., *Platt*, B., and *Martin*, B.

(c) See the 2nd Common Law Procedure Act, 17 & 18 Vict. 125, s. 45.

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NICHOL v. GODTS.

June 6.

THE declaration stated that, by an agreement, the plaintiff contracted and agreed with the defendant to sell and deliver to the defendant, and the defendant contracted and agreed with the plaintiff to buy of and accept from him certain goods, to wit, five parcels of refined rape oil, warranted only equal to certain samples, at 45*l.* per ton, real tare, and usual draft, to be free delivered and paid for to a point in fourteen days in ready money, allowed two and a half per cent discount. The declaration, after the usual averments, and after alleging that the plaintiff was, in a reasonable time after the making of the said contract, and within the said fourteen days, ready and willing to make a free delivery of the said goods to the defendant, according to the contract, and that the plaintiff did deliver a certain portion thereof, which the defendant accepted, laid as a breach the refusal by the defendant to accept the residue of the said goods.

An agreement for the sale and delivery of certain oil, described as "foreign refined rape oil, warranted only equal to samples," is not complied with by the tender of oil which is not "foreign refined rape oil," although it be equal to the quality of the samples.

The defendant pleaded (*inter alia*) that the plaintiff was not ready and willing to sell and deliver, or to make a free delivery to the defendant of the said residue, according to the contract; but was only ready and willing to sell and deliver to the defendant, and to make a free delivery to him of goods which were not refined rape oil, and were not equal to the said samples, as and for the said residue of the said goods. Upon this plea issue was joined.

At the trial, before *Parke*, B., at the London Sittings in the present Term, it appeared that the plaintiff had sold to the defendant, through his broker, a quantity of rape oil in the ordinary way by bought and sold notes. The sold note was in the following terms:—

"London, 31st January, 1854.

"Sold this day, for Messrs. A. Nichol & Sons, to Mr. U.

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A. Godts, the five undermentioned parcels foreign refined rape oil, being about thirty-three tons (little more or less), warranted only equal to samples at 35*l.* per ton."

At the time of the sale samples of the oil were delivered to the defendant, and, according to the plaintiff's evidence, the defendant was told that the oil was mixed to a certain extent with other oil, and for that reason it was sold only equal to the samples. The defendant had accepted part of the oil that had been delivered in performance of the agreement, but had refused to take the residue, on the ground that it was not foreign refined rape oil, but a mixture of hemp and rape oil. The oil tendered corresponded with the samples given, which consisted of rape oil adulterated with hemp oil. On the part of the plaintiff, it was admitted that the oil was not foreign refined rape oil; but it was contended that the oil was known in the market as such. And upon this point evidence was adduced on both sides. It was also contended, on the part of the plaintiff, that, as the oil was sold by samples, the defendant was bound to accept the oil, as it corresponded with the samples.

The learned Judge told the jury that the statement in the sold note as to the samples related to the quality only of the article; and that according to the contract the defendant was entitled to have rape oil delivered to him, unless the plaintiff could shew a distinct usage in the oil trade by which the words "rape oil" are understood to mean a mixture of rape and hempseed oil; and that the

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ground of misdirection.—The jury ought to have been told that the plaintiff had complied with the contract by delivering an article which corresponded with the samples. The oil was warranted *only* equal to samples. The delivery of the samples was for the purpose of avoiding all dispute as to the thing itself. Where an article is sold by sample, the purchaser has an opportunity of judging of its quality, and he therefore knows what he buys. [*Parke, B.*—I told the jury that the oil must be equal in quality to the samples, and that the plaintiff agreed that it should also be foreign rape oil. *Pollock, C. B.*—The plaintiff is bound to deliver something of that description which he contracts to deliver. *Platt, B.*—The plaintiff would not have fulfilled the terms of this agreement if he had delivered whale oil, although the samples had consisted of that description of oil.] The article here, although adulterated, corresponded with the samples, and the defendant knew what he was purchasing, and consequently was not deceived.

POLLOCK, C. B.—This is an application for a new trial, on the ground of supposed misdirection by my Brother *Parke*; and I am of opinion that there ought to be no rule. The question turns upon the meaning of certain words in the contract, by which the plaintiff sold a quantity of oil to the defendant; and the question is, whether the defendant was bound to take and pay for the oil which the plaintiff delivered to him, and which the latter refused to accept. The important words in the contract are these: "foreign refined rape oil, warranted only equal to samples." My brother *Parke* told the jury that, according to the true construction of this contract, not only the article delivered must agree with the samples in quality, which was the meaning of the words "warranted only equal to samples," but also that the oil ought to agree with the description of it in the contract as to its character. It was contended by *Mr. Watson* that the expression

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"warranted only equal to samples" excluded every other description of warranty; and, provided the oil delivered equal to the samples, that was sufficient to render the defendant liable to take it and pay for it, although, in fact, it did not answer the description of being foreign refined rape oil. The effect of that argument is, to render words "foreign refined rape oil" of no avail. Such a proposition cannot be supported. I think the direction was perfect; for, as my Brother *Platt* observed, it could be contended that, if it had turned out that the oil was whale oil, the contract would have been performed. By terms of this contract, it must be taken that the plaintiff agreed to deliver foreign refined rape oil, and not that he professed to sell any oil whatever. Mr. *Watson* then contended, that, as between the parties themselves, the samples were oil which was understood by them as being foreign refined rape oil; and witnesses were called to shew that such was the understanding between these parties. But the contract must be read according to what is written by the parties, for it is a well-known principle of law, that a written contract cannot be altered by parol. If A. and B. make a contract in writing, evidence is not admissible to shew that A. meant something different from what is stated in the contract itself, and that B. at the time assented to it. If that sort of evidence were admitted, every written document would be at the mercy of witnesses that might be called to swear anything. Brother *Parke* was quite correct in telling the jury that they were satisfied that the plaintiff had established the fact that, by the general usage of persons dealing in this particular article, the oil in question was denominated foreign refined rape oil, the plaintiff would be entitled to the verdict. The jury found for the defendant, adding, however, that the defendant knew what he was buying. The case therefore resembles that which I have already put, viz. that a written contract cannot be contradicted by evidence of

meaning which the parties allege that they themselves attach to its words.

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PLATT, B.—I am of the same opinion. By the terms “only equal to samples” I understand that the oil to be delivered was to be equal to the samples in *quality*. But the defendant did not refuse to accept the oil tendered to him on the ground that it did not equal the samples, but on account of its not being foreign refined rape oil at all. And the learned Judge told the jury that, if they should think that was so, the defendant was not bound to accept it. That direction was perfectly correct. If the jury had found that the article which the plaintiff tendered was known in the market under the name and description of foreign refined rape oil, the plaintiff would have been entitled to succeed; but that question was put to the jury, and they were of opinion that it was not known as such. Then how could it be said that what the plaintiff tendered was what he agreed to sell.

MARTIN, B., who was not present during the whole of the case, said that he concurred in what had been said by the Court.

PARKE, B.—I am of opinion that a sale by sample relates only to the quality of the article sold by the sample. The evidence went to shew that the oil offered did not answer the description of the article sold, and the jury so found. The warranty affects only the quality, but not the nature of the article itself.

Rule refused (a).

(a) See *Gompertz v. Bartlett*, 2 E. & B. 849.

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June 13.

LAKE v. PLAXTON.

On the trial of a question between the lord of a manor and a commoner, as to the right of the former to inclose a portion of the waste, leaving a sufficiency of common for those having a right of common there, the waste being part of a royal forest:—*Held*, that the right of the Crown to turn deer on the waste did not form an element for the consideration of the jury on the question of sufficiency of common, in a case where no deer had been turned on the waste for upwards of twenty years.

THIS was an action of trespass for breaking the plaintiff's close, and for throwing down a certain fence of the plaintiff. The defendant pleaded that he was the owner of 200 acres of land in the parish of Wanstead, and that, as appurtenant to that land, he had a right of common upon the wastes of the parish; and that the close in question had been fully inclosed by the plaintiff; and that the defendant did not enjoy his right of common of pasture; and that, therefore, he had pulled down the fence. The plaintiff replied that Lord Wellesley, the lord of the manor of Wanstead, was the owner of these wastes, and that he had appurtenant and inclosed this space of thirty-four acres, leaving sufficient common of pasture for the use of the defendant and the parties having right of common there; and that Lord Wellesley had demised the close in question to the plaintiff. The defendant, by his rejoinder, denied that there was sufficient common of pasture left for the purpose mentioned. Upon which issue was joined.

At the trial, before *Cresswell, J.*, at the last Essex Summer Assizes, it appeared that Lord Wellesley, the eldest son of Lord Mornington, was the lord of the manor of Wanstead, and that he had inclosed a piece of the waste, to the extent of thirty-four acres; that Wanstead formed a part of the Royal Forest of Waltham; and that, for the protection of deer belonging to the Crown during the space of a month in that season of the year when deer breed, the cattle were turned off the waste. This time, which is called the "fence month" (a), was still observed, although there was no evidence that any deer had been seen there for upwards of twenty years.

On the part of the defendant it was contended that the right of the Crown to turn deer upon the waste

(a) See *Manwood*, tit. "Fence month."

element for the consideration of the jury in determining the question of the sufficiency of common. The learned Judge, however, said, that he would treat the case as independent of any right which the Crown had; and left the case to the jury with that view. The plaintiff had a verdict.

James obtained a rule nisi for a new trial, (inter alia), on the ground of misdirection.

In last Easter Term (April 28)

Sir *P. Thevisger* and *Bovill* (*Willes* with them) shewed cause.—The lord of the manor had the right to approve if he left sufficient of common upon the rest of the waste. He has such right under the statute of Merton, 20 Hen. 3, c. 4. The right of the Crown to turn deer upon the forest was not a question for the consideration of the jury in arriving at a conclusion as to the determination of such sufficiency. The dispute is between the lord and the commoners, and the right of the Crown, being a distinct right, does not affect the right of common: *Manwood's Treatise on Forest Laws*, 4th edit p. 96. In the same treatise it is laid down (a), that "it appeareth in charta de forestâ, article 1, that where the king hath afforested his own woods or lands, the same shall remain a forest; but *salvâ communiâ de herbagio, et aliis in eadem forestâ, illis qui prius eam habere consueverunt*. So that by the afforestation, he doth not abridge or prejudice any man to have common who had a right before; but the same is reserved, as it was at common law; a fortiori, where he afforests the woods and lands of another man he doth not abridge their right to have common in any waste soil or other place in the forest where they used to have common before, and with such cattle as are commonable there." The existence of such right of the Crown does not deprive the lord of the right to approve, as was suggested by the Court on the motion for the rule. If such right of the Crown were to be taken into consideration, the lord would never be able to exercise his right to approve. There was no evidence that

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(a) Page 82.

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the Crown had right of common upon the waste. In *Boulcott v. Winmill* (a), it was held by the Court of King's Bench, that there may be a valid custom in a manor within the limits of an ancient forest belonging to the Crown, for the lord, with the assent of the homage, to grant parcels of the waste to be held in severalty by copy of court roll, and inclosed in exclusion of persons having right of common. Lord *Ellenborough*, C. J., there said, "I see no reason why the waste may not legally be granted out in the manner stated in the replication, although part of the manor be within the royal forest of Waltham. The Crown may still exercise the same rights of forest over it as before. Whether the deer be excluded must depend upon the nature of the inclosures. If the fences erected are higher than are permitted by the laws of the forest, the forest officers may still interfere and break them down. According to the custom, the grant is only to the exclusion and abolition of rights of common, not of the rights of forest. I know instances in Windsor forest in which the Crown has made grants in severalty, reserving the rights of forest, with an advanced rent while these rights shall not be exercised." This right of the Crown is analogous to that of the right of turbary. And in *Fawcett v. Strickland* (b), it was held, that the lord of a manor may inclose part of a common against tenants having common of pasture, notwithstanding they have also common of turbary, if he leave sufficient common of pasture. *Willes*, C. J., in delivering the judgment of the Court, says, "Though a lord cannot by virtue of the statute of Merton inclose and approve against common of turbary, and so it is expressly laid down by Lord *Coke* in 2 Inst. 87, in his comment on this statute, which we admit to be good law, yet, we are of opinion that where there is common of pasture and common of turbary in the same waste, the common of turbary will not hinder the lord from inclosing against the common of pasture, for they are two distinct rights. Supposing one man has common of pasture and another has common of

(a) 2 Camp. 261.

(b) *Willes*, 57.

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turbary in the same waste, he that has common of pasture cannot justify throwing down the lord's inclosure, provided there be sufficient common of pasture left, because another person has common of turbary in the same common. And wherever rights are in their nature distinct, as common of pasture and common of turbary certainly are, we think it will be just the same, though they happen to concur in one and the same person, as they do in the present case. If it were otherwise, it would be just the same in common of piscary and common of estovers, for Lord *Coke* says, that the statute does not extend to either of them. And yet it would seem to be absurd to say, that a lord cannot inclose against common of pasture, because his tenants or some other persons have common of piscary or common of estovers in the same waste; whereas his inclosure may be no interruption to their enjoyment of their common of piscary or estovers; nay, probably, their common of estovers may be better for such inclosure. If, indeed, by such inclosure, their common of piscary or their common of estovers were affected, or they were interrupted in the enjoyment of either of these rights, they might certainly bring their action, and the lord, (to be sure) in such case, could not justify such inclosure in prejudice of these rights. And so may the plaintiff, in the present case, if he be interrupted in the enjoyment of his common of turbary: but, by his present action, he does not complain of any such interruption, nor does he insist upon any such matter in his replication." The authority of this case was recognised and acted upon in *Shakespear v. Peppin* (a). Although the right of turbary would go to diminish the pasture, yet the question there is, whether sufficient pasturage is left. Assuming, therefore, that there was evidence of the right of the Crown to turn deer on the waste, it was not a question for the jury as between the lord and the commoners. And, as a matter of calculation, it was properly excluded, inasmuch as there was no evidence of the existence of any deer in the place for many years.

(a) 6 T. R. 741.

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James, Bramwell, and Rodwell in support of the rule.—The right of the Crown, of which right there was evidence, was improperly withdrawn from the consideration of the jury, who were called upon to estimate the sufficiency of common left, after deducting the amount of the waste which the plaintiff had inclosed. The recent Act, 14 & 15 Vict. c. 43, "An Act for disafforesting the forest of Hainault in the County of Essex," recognises the rights of the Crown over this forest. The amount of the pasturage would be diminished by deer being fed in the place. The plaintiff is bound to shew that he has left sufficiency of common remaining; and the defendant relies upon the right of the Crown, not merely as such, but as introducing an element of uncertainty which the plaintiff is bound to clear up. If there had been a rabbit warren, the jury could not have disregarded such a fact in their calculation. The learned Judge, therefore, improperly withdrew this matter from the consideration of the jury.

Cur. adv. vult.

POLLOCK, C.B., now said.—In this case the particular point left for our decision, and one on which the motion was founded, was that, in calculating whether sufficient common had been left after the inclosure by the lord of a certain portion of the common, no calculation had been made with reference to the Crown's right to put deer to an unlimited extent upon the common. My learned Brother *Cresswell* directed the jury to make the calculation, upon the question of sufficiency, without reference to that right of the Crown, or the possibility of the Crown interfering and putting any deer upon the common, it being proved in point of fact that there had been no deer there for upwards of twenty years. We are of opinion that, under these circumstances, the learned Judge was perfectly right in so directing the jury, inasmuch as the right in question ought not to have been an element in the calculation. The rule for a new trial will therefore be discharged.

Rule discharged.

1854.

The Guardians of the Poor of the LEXDEN AND MUNSTER
UNION v. SOUTHGATE.

June 13.

WOOLLETT, on the part of the defendant, moved (a) for a prohibition directed to the judge of the County Court held at Colchester, to stay him from further proceeding with the plaint in this case. It appeared that a plaint had been issued on behalf of the guardians of the poor for the Lexden and Munster Union against the defendant, in which the plaintiffs proceeded against the defendant as administrator of John Ingate Southgate, deceased, and as executor of Jane Southgate his widow, deceased, for the sum of 17*l.* 1*s.* paid for the support of the children of the deceased. On the trial evidence was tendered on behalf of the defendant, that he was not the executor; and he called upon the judge to make the plaintiffs elect in which of the two characters they would proceed against him; but this the learned judge refused to do. It was further objected, that the plaintiffs, as guardians of the poor, were a corporate body, and that the appointment of the attorney must be by resolution at a meeting, as required by 5 & 6 Vict. c. 57, s. 17, and that there was no such evidence. The Judge overruled this objection also, and the plaintiffs had judgment. The affidavit in support of the rule stated, that, although the defendant was administrator of John I. Southgate, he had not been appointed executor of the widow, and not done any act to render himself executor de son tort.

The defendant was sued in the county court in the double capacity as executor of A. and administrator of B. On the trial, the defendant objected that the plaintiffs ought to elect in which capacity they proceeded against him; and further, that there was no evidence that the attorney, who appeared in support of the claim, had been duly authorised by the plaintiffs, who were the guardians of the poor of a parish, to bring the action. The judge overruled both objections, and gave judgment against the defendant generally:—*Held*, assuming the decision to be incorrect, that, as the Judge acted within his jurisdiction, such objections afforded no ground for a prohibition.

Woollett in support of the motion.—First, the judge of the county court had no jurisdiction to try two separate and distinct claims under one summons; and a general judgment

forded no ground for a

(a) June 8.

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having been given against the defendant in the double capacity of administrator and executor, he is unable to apportion the claim. Secondly, until it was shewn that the attorney acted by proper authority, as required by the 5 & 6 Vict. c. 57, the cause was not in court, and the judge had no jurisdiction; and the proper course was to strike it out of the paper, as required by the 79th section of the 9 & 10 Vict. c. 95. [*Pollock, C. B.*—The Court will consider whether a rule ought to be granted. The amount is so small, that no rule will be granted, unless it be very clear that the rule will be made absolute.]

Cur. adv. vult.

POLLOCK, C. B., now said.—In this case the plaint was against the defendant in a double capacity, and the judge of the county court pronounced judgment against him generally. On the motion for the rule, we were very much pressed to grant it, on the ground that such decision was not only erroneous, but that the judge had no jurisdiction. We have considered the question, and are of opinion that there ought to be no rule. It may be, that the decision was erroneous; but, even in a case where there is not a particle of evidence to support the decision, still if the county court has jurisdiction, that is no ground for a prohibition. The County Court Act gives relief in certain cases upon application to a superior Court before trial, and by appeal after trial; but the present case does not fall under either form of relief. Upon the ground, therefore, that the decision, though perhaps erroneous, was made with jurisdiction, the rule must be refused.

Rule refused.

TRINITY VACATION, 18 VICT.

 AVANZO v. MUDIE.

1854.

June 28.

THE declaration stated that, after the passing of the 7 & 8 Vict. c. 12, her Majesty duly, and according to the statute in such case made, by Order in Council directed, that as respects prints which should after the 17th of January, 1852, be first published in France, the authors, inventors, engravers, and makers thereof respectively, their respective executors, &c., shall have the privilege of copyright therein, during such period as the authors, inventors, designers, engravers, and makers of the like works first published in the United Kingdom were then entitled to under the statutes then in force relating to the copyright thereof; that the plaintiff was, at the time of committing the grievance, &c., and still is, the proprietor of a certain print, to wit, a lithograph called *La Moisson Abondante*, first published in France after the 17th January, 1852, and was at the time of the committing of the grievances, &c., and still is, entitled to the sole right and liberty of printing and reprinting the same: Yet the defendant, after the said first publication of the said print, and whilst the plaintiff was such proprietor, did unlawfully publish, sell, and otherwise dispose of copies of the said print, &c., without the consent of the plaintiff, so being such proprietor thereof, which copies, so published, sold, and disposed of by the defendant, had been engraved, etched, worked, lithographed and copied from the print of the plaintiff, &c.

Sixth plea.—That the name of the proprietor thereof was not nor is truly engraved upon the plate from which the said print was taken.

The proprietor of a foreign print cannot claim copyright therein under the International Copyright Act, (7 & 8 Vict. c. 12), unless the date of publication and name of the proprietor are engraved on the plate and printed on the print as required by the 8 Geo. 2, c. 13.

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Seventh plea.—That the name of the proprietor thereof was not nor is truly printed on the said print.

Eighth plea.—That the day of the first publishing thereof was not nor is truly engraved upon the plate from which the said print was taken.

Ninth plea.—That the day of the first publishing thereof was not nor is truly printed on the said print.

Demurrers and joinders therein.

Hawkins, in support of the demurrers.—The question raised by the demurrers is, whether the proprietor of a foreign print who claims copyright therein under the International Copyright Act, 7 & 8 Vict. c. 12, is bound to comply with the provisions of the 8 Geo. 2, c. 13. By the 1st section of the latter Act, the copyright in such prints as are there described is vested in the proprietor “for the term of fourteen years, to commence from the day of the first publishing thereof, *which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints.*” It is true, that the 7 & 8 Vict. c. 12, recites the 8 Geo. 2, c. 13; but the particulars to be observed in order to obtain a copyright under the 7 & 8 Vict. c. 12, are prescribed by the 6th section, which enacts that “as regards prints, the title thereof, the name and place of abode of the inventor, designer, or engraver thereof, the name of the proprietor of the copyright therein, and the time and place of the first publication thereof in the foreign country named in the Order in Council under which the benefits of the Act shall be claimed, shall be entered in the said Register Book of the said Company of Stationers in London.” [*Martin*, B.—The 4th sect. of the 7 & 8 Vict. c. 12, expressly says, that in case the Order in Council shall apply to prints, “*all and singular the enactments of the said Engraving Copyright Acts*” shall apply to and be in force in respect of the prints to which such order shall extend, and which shall have been registered as thereinafter provid-

ed, in the same manner as if they had first been published in the United Kingdom, except such of the enactments as shall be excepted in such Order."] That means that the proprietors of foreign prints who have *registered* them shall have all the privileges of copyright and remedies for infringement which are given by the Copyright Acts. In *Brooks v. Cock* (a), *Littledale*, J., says, "That the words," which shall be truly engraved on each plate, "are not merely directory, but make such engraving part of the thing to be protected." [*Parke*, B.—It is perfectly clear, that the proprietor of a foreign print who claims a copyright under the International Copyright Act must comply with the provisions of the 8 Geo. 2, c. 13.]

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 v.
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Henniker appeared to argue for the defendant, but was not called upon.

PER CURIAM (b).—There must be judgment for the defendant.

Judgment for the defendant.

(a) 3 A. & E. 138.

(b) *Parke*, B., *Alderson*, B., *Platt*, B., and *Martin*, B.

1854.

June 27.

MAWSON v. BLANE.

The defendant, whilst an infant, accepted, for the accommodation of the drawer, a bill of exchange for 500*l.*, which was indorsed to the plaintiff. When the bill became due the drawer was abroad, and the plaintiff agreed with the defendant to hold the bill on receiving interest. After the defendant came of age, he wrote to the plaintiff as follows:—"Has L. paid you 80*l.* for interest on the 500*l.* bill? Answer by return of post." Subsequently, the plaintiff's brother called on the defendant, and told him that the plaintiff was uneasy about the bill, when the defendant replied that the debt should be paid; and the plaintiff's brother, having requested him to write to the plaintiff to that effect, the defendant wrote the following letter:—"Your brother tells me that you are very uneasy about the 500*l.* bill drawn by Mr. Pottinger upon me. Pray make yourself easy about it, as I will take care that it is paid; and Sir Henry comes to England in June."—*Held*, per *Parke*, B., and *Alderson*, B., that there was no ratification by the defendant of the contract made during infancy within the meaning of the 9 Geo. 4, c. 14, s. 5, but a mere assurance that the defendant would take care that the drawer paid the bill. *Platt*, B., and *Martin*, B., dissentientibus.

ASSUMPSIT by indorsee of a bill of exchange, drawn the 1st of May, 1853, by F. Pottinger upon and accepted by the defendant, for payment to the order of F. Pottinger of 500*l.* three months after date.

Plea: that at the time of the accepting of the said bill of exchange, the defendant was an infant within the age of twenty-one years.

Replication: that the defendant, before the commencement of this suit, attained the full age of twenty-one years, and that the defendant, after such full age, and before the commencement of this suit, duly and according to law ratified and confirmed the said bill of exchange and contract, and his liability thereon.

The rejoinder took issue on the replication.

At the trial, before *Parke*, B., at the Middlesex Sittings in Trinity Term, it appeared that the defendant, who was an Ensign in the Scots Fusilier Guards, had accepted the bill in question for the accommodation of F. Pottinger, the drawer, and that at the time he accepted it he was under the age of twenty-one years. The bill was indorsed by F. Pottinger to one Lee, who had procured the plaintiff to discount it. Before the bill became due F. Pottinger went abroad; and the bill having been dishonoured, application was made to the defendant for payment, when the plaintiff agreed to hold it on receiving interest; and in January,

and the plaintiff's brother, having requested him to write to the plaintiff to that effect, the defendant wrote the following letter:—"Your brother tells me that you are very uneasy about the 500*l.* bill drawn by Mr. Pottinger upon me. Pray make yourself easy about it, as I will take care that it is paid; and Sir Henry comes to England in June."—*Held*, per *Parke*, B., and *Alderson*, B., that there was no ratification by the defendant of the contract made during infancy within the meaning of the 9 Geo. 4, c. 14, s. 5, but a mere assurance that the defendant would take care that the drawer paid the bill. *Platt*, B., and *Martin*, B., dissentientibus.

1853, the defendant gave Lee 80*l.* on account of interest. The defendant came of age on the 1st of February, 1854. On the 21st of that month the defendant wrote to the plaintiff as follows :—

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“ Guards’ Club, Pall-mall, 21st of February.

“ Mr. Mawson,—Has Lee ever paid you 80*l.* for interest on the 500*l.* bill? Answer by return of post. SEYMOUR BLANE.”

On the 22nd of February, Lee and a brother of the plaintiff called on the defendant, who was about to go abroad with his regiment, for the purpose of obtaining his re-execution of a bond for 1000*l.*, which, during his minority, he had given to the plaintiff jointly with F. Pottinger and two other persons, and also his promise or ratification in writing of the bill, in order to his being immediately arrested. The defendant executed the bond without making any observation. The plaintiff’s brother then told the defendant that the plaintiff was very uneasy about the money which the defendant owed on the bill, in consequence of his being ordered abroad; and the defendant having replied that the debt should be paid, the plaintiff’s brother requested the defendant to write to the plaintiff to that effect, when the defendant wrote the following letter :—

“ Guards’ Club, 25th of February.

“ Dear Sir,—Your brother tells me that you are very uneasy about the 500*l.* bill drawn by Mr. Pottinger upon me; pray make yourself easy about it, as I will take care that it is paid,—and Sir Henry comes to England in June.—Yours faithfully, SEYMOUR BLANE.”

Upon the above facts the defendant’s counsel submitted that there was no sufficient promise or ratification by the defendant of his contract after full age. The learned Judge was of that opinion, and directed a verdict for the defendant, reserving leave to the plaintiff to move to enter a verdict for him for the amount of the bill and interest.

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Montagu Chambers, in the same Term, obtained a rule nisi accordingly; against which

Edwin James and *Hawkins* shewed cause (June 27).—There was no sufficient ratification or promise by the defendant. The letter of the 22nd of February is not in terms, nor was it meant to be, a ratification of the defendant's contract. It is a mere assurance that the defendant will do his best to get the bill paid on the arrival of Sir Henry Pottinger in England. [*Platt*, B.—It amounts to a guarantee of the payment.] If it be so treated, it is only a conditional undertaking, upon which no action would lie until after the arrival of Sir Henry Pottinger. To constitute a ratification, there must be an acknowledgment of some contract made during infancy, which would have been binding had the party been of full age, and a consent that it shall be binding now he is of full age. [*Parke*, B.—If the defendant had written, "I will ratify the bill, but I will not pay it until Sir Henry Pottinger returns to England," the plaintiff could not have sued until after his return. *Alderson*, B.—The meaning of the letter is: "Mr. Pottinger made the contract, and I will take care that he performs it." An infant who signs a bill of exchange as acceptor is not primarily liable; it is the drawer of the bill who is primarily liable.] In Richardson's Dictionary, the word "ratify" is defined as meaning "to affirm or confirm."

Quain, in support of the rule.—The defendant, by his letter of the 21st of February, recognises the bill as a binding security, and the letter of the 25th of February amounts to a ratification of the contract. The defendant assigns two reasons why the plaintiff should not be anxious about the bill: first, because the defendant will see it paid; and secondly, because Sir Henry Pottinger will return to England in June. According to the plaintiff's construction, the word "and" must be read as if it were "when."

If the words "I will take care that it is paid," had stood alone, there could have been no doubt on the subject; and what follows is a statement that the plaintiff has an additional security for the bill being paid. The meaning is rendered clear by introducing after the word "and," the word "besides" or "moreover." [Parke, B.—The defendant does not say that he will pay the bill himself. If he meant to be liable, he would have said that he would pay it in the first instance, for he was the acceptor.] A very slight acknowledgment of the promise is sufficient to afford an implication of a new contract: *Smith's Lead. Cas. 373*. In *Harris v. Wall* (a), the letters which were held a ratification amounted far less to a consent that the original promise should be binding than those in the present case, since there the intention was, that the debt should be paid out of money in the hands of a third party. [Alderson, B.—In *Harris v. Wall*, there was no person who could be liable but the defendant; here, another person is primarily liable, and the defendant in effect says, "I will take care that he pays you, and you may rest assured of being paid, as his father will soon return to England."] The doctrine laid down in *Harris v. Wall* is, that "any written instrument signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will in the case of an infant who has attained his majority amount to a ratification." Then suppose this bill had been accepted by an agent on behalf of the defendant, being of full age, could there have been any doubt but that the letter would have amounted to an adoption of the agency? If this is a conditional promise, what is the condition? Does the defendant undertake to pay on the arrival of Sir Henry Pottinger in England, or on his arrival in June, or to pay at all events if Sir Henry Pottinger does not? How could a declaration be

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framed on such a promise, supposing that Sir Henry Pottinger arrived in July, or died on the voyage?

Cur. adv. vult.

PARKE, B., now said.—The question in this case was, whether a letter written by the defendant after he came of age was a sufficient ratification of a contract made by him whilst an infant. That depends entirely on the construction of the letter. (His Lordship stated the facts, and read the letter of the 25th of February, 1854.) By the statute 9 Geo. 4, c. 14, there must be either a promise by the defendant in writing after he came of age, or a ratification of the prior contract. The term “ratification” has already received an interpretation in the case of *Harris v. Wall*, where it was held to mean such a ratification as would make a person liable as principal for an act done by another in his name. It seems to me that the meaning of “ratification” is something different from “promise.” It is an admission that the party is *liable and bound* to pay the debt arising from a contract which he made when an infant. Therefore, in order to bring this case within the 9 Geo. 4, c. 14, there must be an admission in writing by the defendant that he was liable to pay on that contract which he made when a minor, that is, that he was liable and bound in præsentī to pay the acceptance. Now, so understanding the meaning of the term “ratification,” I was of opinion at the trial, and am still of the same opinion, that this letter does not amount to a sufficient acknowledgment of the defendant’s liability as acceptor of the bill, but merely that he considered himself bound in honour to pay it, with an assurance that it would be paid. The terms of the letter are “I will take care that it is paid,” not “I will pay it, because I am liable as acceptor.” All that he means is, to give an assurance that some person will pay it. It is clear to whom he alludes as the party to pay it,

viz the drawer, and he points to the arrival of Sir Henry Pottinger in England as the source from which the money was to be derived. There is no admission that, as acceptor of the bill, he is primarily liable, but a mere assurance that the plaintiff need not be uneasy about it, since it would certainly be paid.

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ALDERSON, B.—I am of the same opinion. I am by no means pressed with the difficulty which Mr. *Quain* suggested, as to how a declaration could be framed if this were a conditional promise, because I do not think it a promise at all. The defendant did not intend, by this letter, to make himself any more liable than he was before. He was not liable before as acceptor, because when he accepted the bill he was an infant. The drawer of the bill, who was abroad, was liable, and the defendant meant to leave him so. I think also, that the defendant meant to consider himself bound in honour to pay the bill if the drawer did not. No doubt he accepted it for the sole benefit of the drawer, and he intended to see that the drawer paid it, as bound in law to do, and he represented to the plaintiff that the drawer would do so as soon as his father returned from abroad. All that the letter meant is, I will do my best endeavours to get the drawer to pay the bill; and I state to you further that he will be able to do so through the kindness of his father.

PLATT, B.—I entertain a different opinion. It seems to me that this letter is a ratification of the defendant's contract. The language is certainly consistent with that view. The defendant says, "I will take care that it is paid." Now the defendant was the acceptor, the person primarily liable; and when a person who is primarily liable to pay a bill says "I will take care that it is paid," surely the meaning is that he will perform his contract. But even if the defendant was only secondarily liable, by reason of his

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having accepted the bill for the accommodation of the drawer, still it seems to me that this letter is a ratification of the contract, for, standing in the relation of drawer, he undertook to see the bill paid. I therefore think that the rule ought to be absolute.

MARTIN, B.—My opinion also is that the rule should be absolute. The reason for my judgment is the decision in *Harris v. Wall*, which was as I think a weaker case than the present. Perhaps, if I had to decide the point *de novo*, I should not agree with all that is stated in *Harris v. Wall*, because I cannot think that the definition of “ratification,” as there given, is correct. I apprehend a ratification to be a consent by a person after he becomes of full age to be liable for a debt contracted during infancy, expressing, to the effect, that he is willing to affirm it and treat it as valid. But I adopt the judgment of the Court in *Harris v. Wall*, and as, in my opinion, this is a stronger case against the defendant than against the defendant in that case, I think I ought to act on that decided case.

The Court being equally divided in opinion the rule dropped.

Rule dropped.

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THE declaration stated that the plaintiff sued the defendant for money payable by the defendant to the said company, for money had and received by the defendant for the use of the said company, and for money due from the defendant to the said company upon accounts stated between him and the said company.

Plea : never indebted.—Upon which issue was joined.

At the trial, before *Martin*, B., at the London Sittings after last Easter Term, it appeared that the action was brought by the plaintiff as secretary of "The Farmers and General Fire and Life Insurance and Loan and Annuity Company" against the defendant, who was an agent of the company, to recover 303*l.* 17*s.* 10*d.*, being a balance due on account of monies received by the defendant as such agent for premiums of insurance.

At the time the defendant received the money, he was a shareholder in the company and had executed the deed of settlement (a) and he continued to be a shareholder up to

The 3 & 4 Vict. c. xcv., after reciting, that several persons had formed themselves into a company or partnership for effecting assurances on lives, and that difficulties might arise in recovering debts due to the company, since, by law, all members of the company must be named in every action or suit for such purpose, enacted that all actions and suits against any person indebted to the company, or upon any

books, covenants, bills of exchange, promissory notes, contracts, or agreements, and, generally, all other proceedings whatsoever at law or in equity, by or on behalf of the company, against any person or persons, whether such person or persons be a proprietor or proprietors of the company or not, shall be commenced in the name of the chairman, or of a director, or the secretary of the company as the nominal plaintiff:—*Held*, that the company might sue in the name of the nominal plaintiff, one of its own members for a debt due to the company.

(a) The following clauses in the deed of settlement were referred to:—

5. "That the affairs of the company shall be conducted by a chairman of directors, a managing director, and ten other directors."

7. "That there shall be three trustees of the company, to be elected from the directors for the time being."

56. "All the books, goods, chattels, and other moveable and personal estate, and all monies at the bankers and in hand, or

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the time the action was brought. The plaintiff sued under the provisions of the 3 & 4 Vict. c. xcv. (a), intituled "An Act

in the office of the company, and other notes and property in negotiable securities, cheques, or drafts respectively, for the time being, of or belonging to or held for the benefit of the said company, shall be and be deemed at law the property of the persons being trustees for the time being of the said company, so as to be, and in all criminal and civil proceedings to be treated as, the property of the persons who for the time being shall be such trustees, and not in the whole or in part of any of the other individuals being members of the said company."

The 75th clause, after providing for payment of expenses out of the profits, directed that the residue should be divided into ten parts; one-tenth to go to the augmentation of the guarantee fund, eight-tenths to the shareholders, and the remaining one-tenth to be applied in the promotion of agricultural purposes.

158. "That all debts, liabilities, and engagements due to and subsisting with the company, by or on the part of every or any proprietor on any account whatsoever, shall in all cases be a primary and paramount lien on the shares of every such proprietor, whether the said debts, liabilities, or engagements be those of such proprietor solely or jointly, or in part-

nership with any other person, and the directors are hereby empowered to cancel and extinguish, and declare forfeited, or to sell and dispose of, the shares of such proprietor, either wholly or in part, at their discretion, for or towards the satisfaction of such debts, liabilities, or engagements."

(a) The following are the material sections of the Act:—

Sect. 1. "Whereas several persons have formed themselves into a company or partnership in the county of Middlesex by the name of 'The Farmers and General Fire and Life Insurance and Loan and Annuity Company,' in order to carry on the business of making or effecting assurances on lives and survivorships and against loss by fire: And whereas difficulties may hereafter arise in recovering the debts and monies due to the said company, and in maintaining actions for damages done to the said company or to the property of the said company, since by law all the members for the time being of the said company must be named in every action or suit carried on for such purpose: And whereas it would be convenient that persons having demands against the said company should be entitled to sue the manager, chairman, or one of the directors or secretary for the time being of the said company: And whereas

to enable 'The Farmers and General Fire and Life Insurance and Loan and Annuity Company,' to sue and be sued in the

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it would be convenient that prosecutions for embezzlement, robbery, or stealing the property of the said company, or for fraud or any other offence against the said company, should be instituted and carried on in the name of the said company, or in the name of the manager, chairman, or one of the directors or the secretary for the time being of the said company: Wherefore, for obviating and removing the difficulties aforesaid, be it enacted, &c., that, from and after the passing of this Act, all actions and suits whatsoever against any person or persons already indebted or who may be hereafter indebted to the said company called 'The Farmers and General Fire and Life Insurance and Loan and Annuity Company,' and all actions, suits, and other proceedings whatsoever at law or in equity for any injury or wrong done to any real or personal property of the said company, or upon or in respect of any present or future liability or liabilities to the said company, or upon any bonds, covenants, bills of exchange, promissory notes, contracts, or agreements which already have been or hereafter shall be given or entered into to or with the said company, or wherein the said company is or shall be interested, and all instruments, petitions, and other proceedings for or incidental to the issuing or

prosecuting any fiat in or commission of bankruptcy in England or Ireland, or any sequestration in Scotland, against any person or persons already indebted or who may be hereafter indebted to the said company, and liable to be made bankrupt by the laws now or at any time hereafter in force relative to bankrupts and traders in England and Ireland, or to sequestrations in Scotland, and all proceedings at law or in equity under any commission of or fiat in bankruptcy, or under any sequestration by, for, or on behalf of the said company, or wherein the said company is or shall be concerned or interested, and generally all other proceedings whatsoever at law or in equity, to be commenced, instituted, or carried on by or on behalf of the said company, or wherein the said company is or shall be concerned or interested, against any person or persons, body or bodies politic or corporate, or others, whether such person or persons, or any of such persons, or such body or bodies politic or corporate, or any member or members thereof respectively, is or are or shall be or shall have been a proprietor or proprietors of the said company or not, shall and lawfully may be commenced, instituted, presented, and prosecuted or carried on in the name of the person who shall be the manager or chairman of the said

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name of the manager, chairman, or any one of the
 tors, or the secretary of the company."

company at the time such suit, action, or proceeding shall be commenced or instituted, or such petition presented, or in the name of any one director or the secretary for the time being of the said company as the nominal plaintiff, pursuer, complainant, appellant, or petitioner, or as acting in any other character for or on behalf of the said company; and all actions, suits, and other proceedings at law or in equity, to be commenced, instituted, or prosecuted against the said company by any person or persons, or body or bodies politic or corporate, whether such person or persons, or any of such persons, or such body or bodies politic or corporate, or any member or members thereof respectively, is or are or shall be or shall have been a proprietor or proprietors of the said company or not, shall and lawfully may be commenced, instituted, and prosecuted against the said manager or chairman for the time being, or against any one director or the secretary for the time being, or, in the event of there being no manager, chairman, director, or secretary, in the name of any proprietor of the said company, as the nominal defendant, respondent, or defender in such last-mentioned actions, suits, or proceedings for or on behalf of the said company; and the death, resignation, or removal, or any

other act of such manager, man, or director or shall not abate or prejudice any action, suit, petition, proceeding at law or in equity commenced or instituted under this Act, but the same shall continue, prosecuted, or defended in the name of any one other manager, or director, or secretary for the time being of the said company.

Sect. 2. "That, from the passing of this Act, it shall be lawful for the said manager, chairman, or any director or secretary for the time being of the said company to prefer any indictment or informations, criminal proceedings or informations, in any Court of law, against any person or persons, or body or bodies politic or corporate, for any offence already committed or which shall hereafter be committed against the said company; and in all indictments or informations, and other proceedings against any persons, whether such persons or any of such persons be a proprietor or proprietors of the said company or not, for fraudulently taking, stealing, converting, damaging or destroying, or for any offence relating to any goods, notes, bills, bonds, deeds, securities, monies, effects, real or personal property, or for any offence against the said company, such goods

It was objected on behalf of the defendant, that the action was not maintainable by the company against one of

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notes, bills, bonds, deeds, securities, monies, effects, or property respectively may be laid and stated to be the goods, chattels, notes, bills, bonds, deeds, securities, monies, effects, or property respectively of 'The Farmers and General Fire and Life Insurance and Loan and Annuity Company;' and in all indictments, informations, and other proceedings against any person or persons, whether such person or persons or any of such persons be a proprietor or proprietors of the said company or not, for any conspiracy, crime, fraud, or offence already committed or which shall hereafter be committed with intent to injure or defraud the said company, the same may be laid and stated to have been done with intent to injure or defraud 'The Farmers and General Fire and Life Insurance and Loan and Annuity Company;' and it shall not be necessary to state in any such indictment, information, or other proceeding the name or names of all or any of the persons now or at any time hereafter constituting the said company, and any offender or offenders shall or may thereupon be lawfully convicted of such conspiracy, crime, fraud, or offence, in as full, valid, and effectual a manner, to all intents and purposes, as if the names of all the persons constituting the said company, and the name or names of the person or persons

in whom the goods, chattels, notes, bills, bonds, deeds, securities, monies, effects, or property relating to which such indictment, information, or other proceeding shall be preferred, shall or may be vested in trust for the said company, were inserted or used in such indictment, information, or other proceeding or proceedings consequent or attendant thereon."

Sect. 4. "Provided also, and be it enacted, That no person or persons, or body or bodies politic or corporate, having or claiming, or who shall or may have or claim any demand or cause of action or suit upon or against the said company, whether such person or persons or any of such persons shall be a proprietor or proprietors of the said company or not, shall bring more than one action or suit or actions or suits in respect of such demand or cause of action or suit, or alleged cause of action or suit; and in case the merits in respect of any such demand or cause of action or suit, actions or suits, or alleged cause of action or suit, actions or suits, shall have been adjudicated or determined in such action or suit, then and in such case the proceedings in such previous action or suit may be pleaded in bar of any such other or subsequent action or suit, or actions or suits, against the manager, chairman, or secretary, or against any other director or pro-

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its members ; that the above Act only enabled the company to sue in the name of a nominal plaintiff in case before that Act, the partnership firm might have sued; the action should either have been brought in the name of the trustees, or the directors should have enforced the remedy under the 158th clause of the deed. The Judge directed a verdict for the plaintiff, reserving the defendant to move to enter a nonsuit.

Atherton in last Trinity Term obtained a rule accordingly; against which

Hugh Hill and *Cowling* now shewed cause.—This is well brought. The 3 & 4 Vict. c. xcvi. (a), s. 1, enacting that difficulties might arise in recovering money due to the company, since by law all the members for the purpose of being must be named in every action or suit carried on for such purpose, enacts, that all actions and suits which shall be brought against any person indebted to the company, whether the person shall be a proprietor or not, shall be carried on in the name of the chairman, or one of the directors or secretary of the company ; and so with respect to

any person or persons in trust for them or for their benefit, now or hereafter may have upon any person or persons, or body or bodies politic or corporate, whether such person or persons or any of such persons shall be or shall have been a proprietor or proprietors of the said company or not, shall have been determined in any other action or suit previously commenced

or prosecuted by the chairman, or secretary, director or proprietor of the company, then and in the proceedings in such action or suit may in like manner be pleaded in bar of such subsequent or other action or suit, or actions or suits, may be commenced or carried on for the same demand or any other demand of the chairman, or secretary, director or proprietor of the company."

(a) Ante, p. 214, n.

against the company. By the 2nd section (a) indictments may be brought in the name of the chairman or any director, or the secretary of the company, against any person, whether a proprietor or not, and the property may be laid in the company. The 4th section (b), which prohibits more than one action against or by the company for the same cause, also uses the words "any person, whether a proprietor or not." By section 6, a judgment in actions against any chairman, director, or secretary of the company has the same effect against the property of the company as if the judgment had been recovered in an action brought in the names of the proprietors, and as if that Act had not passed; the 7th section provides, if the property of the company is not sufficient to satisfy the sum sought to be recovered, execution may be issued against all or any one or more of the proprietors for the time being; and in case such execution is ineffectual, then against the proprietors at the time the contract was entered into. This Act does not merely provide a remedy for the grievance recited, by substituting a nominal plaintiff for the body of proprietors, but it alters the common law liability of the proprietors, by rendering those persons who are proprietors at the time of action brought, liable in the first instance, whilst those who have left the company, and who may perhaps have made the contract, are liable only in the second degree. This point was raised but not decided, in *Hughes v. Thorpe* (c). In *Skinner v. Lambert* (d), the private Act of the company contained a similar provision, and it was held that the company might sue, in the name of the secretary, one of its own members

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(a) Ante, p. 216, n.

(b) Ante, p. 217, n.

(c) 5 M. & W. 656. The question there arose on the 6 Geo. 4, c. 42, s. 10, (for the better regulation of Copartnership Banks in Ireland), the language of which is similar to the English Banking

Copartnership Act, 7 Geo. 4, c. 46, s. 9; and, in consequence of doubts being entertained whether those enactments enabled the company to sue its own members, the 1 & 2 Vict. c. 96, was passed.

(d) 4 M. & Gr. 477.

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for an instalment of the capital, secured by a deed in which each of the proprietors had covenanted with certain trustees to make due payment of the instalments. That case was recognised and confirmed in *Smith v. Goldsworthy* (a).

The Court then called on

Atherton and *Hawkins* to support the rule.—Looking solely at the deed of settlement, this company is in a situation of an ordinary partnership firm; and though it is competent for partners to make a stipulation of this kind inter se, they cannot by an arrangement amongst themselves alter the rules of law. Then does the 3 & 4 Vict. c. xc enable the company to maintain this action? The object of that Act was to facilitate the suing and being sued, not to originate any new remedy, or create new rights. The recital in the 1st section relates only to civil proceedings, and the “difficulties” which the enactment professes to remedy are those incident to the common law necessity of making all the members parties to the action. To obviate that inconvenience, it enables the company to sue in the name of a nominal plaintiff in cases where before that Act the partnership firm might have sued. The 1st section speaks of “persons indebted to the company.” It is not true, as alleged in this declaration, that the defendant is indebted to the company. The words in the 1st section, “whether such person shall be a proprietor of the company or not,” relate to proceedings in equity, where no doubt an individual member may be sued by the partnership firm. [*Alderson* B.—The previous words are, “all proceedings whatsoever: law or in equity.”] It is conceded, that, with respect to criminal proceedings, the 2nd section introduces a liability unknown to the common law, since a proprietor of the company might be indicted for stealing his own goods; and it had been intended to create a new liability in civil proceedings.

(a) 4 Q. B. 430.

ings, it would have been expressed in plain and unambiguous words. [*Parke, B.*, referred to *Steward v. Greaves*(a).] The 21st section declares, that nothing in that Act shall extend to incorporate the company. The Joint Stock Companies Act, 7 & 8 Vict. c. 110, s. 25, in express terms enables a completely registered company to sue by their registered name any member of the company. *Skinner v. Lambert*(b) is distinguishable, for in that case there was a covenant by the defendant with certain persons as trustees for the company.—They also referred to *Teague v. Hubbard*(c).

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PARKE, B.—I am clearly of opinion that the 3 & 4 Vict. c. xcv. gives the company power to sue one of its members for a debt due to the co-partnership. In the case of *Hughes v. Thorpe* I expressed a doubt, whether, if such a power was intended to be given by the legislature, they had used sufficient language to carry it into effect. But the words of this Act are different from those of the 6 Geo. 4, c. 42, s. 10, upon which the question in that case turned. It seems to me, that by this Act it was meant to make each individual partner liable to the partnership firm. The company does not become a complete corporation, but only for the purpose of enabling it to sue its individual members.

ALDERSON, B.—I am of the same opinion. The language of the Act puts an end to all doubt upon the subject.

PLATT, B., and MARTIN, B., concurred.

Rule discharged.

(a) 10 M. & W. 711. (b) 4 M. & Gr. 477. (c) 8 B. & C. 345.

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July 7.

WATSON v. SPRATLEY.

By indenture, E. granted to Y., his executors, administrators, co-adventurers, and assigns, full license, power, and authority to dig, work, mine, and search for ore, minerals, and metals in and throughout certain limits, and the same to carry away and dispose of to their own use, for twenty-one years. The adventure was a joint-stock company, conducted on the cost-book principle. P. was purser of the mine, which was purchased with money raised by calls on the shareholders. The mode of transferring shares was by a cer-

THE declaration stated, that, in consideration that the plaintiff would buy of the defendant five shares in a certain adventure or company for working a certain mine, called the Boscean mine, at a certain price, to wit, the price of 25*l.* for each of the said shares, the defendant agreed and promised with and to the plaintiff to sell the said shares to the plaintiff at and for the price aforesaid, and to deliver the said shares to the plaintiff within a reasonable time in that behalf; and, although the plaintiff has always been ready and willing to accept the said shares from the defendant and to pay for the same at the price aforesaid, and a reasonable time for the delivery of the said shares had elapsed before the commencement of this suit, yet the defendant has not delivered the said shares, or any or either of them, to the plaintiff, but hath wholly refused so to do.

Plea: non assumpsit.—Upon which issue was joined.

At the trial, before *Martin*, B., at the London Sittings after last Michaelmas Term, the case on the part of the plaintiff was, that the defendant had agreed to sell to the plaintiff five shares in a company for working a mine called the Boscean mine, at 25*l.* a share. The plaintiff made a memorandum of the sale in his pocket book, but there was no note of the sale, addressed by the vendor to the purser and countersigned with an acceptance of the shares by the vendee; on the receipt of which certificate, the purser substituted the name of the latter in the cost-book for that of the vendor. Sometimes the shareholders signed off their names in the cost-book; in which case they ceased to be shareholders, and there was paid to them the value of their shares, estimated with reference to the machinery and ore, but not the mine:—*Held*, (per *Martin*, B., and *Platt*, B.), that shares in this company were not an interest in land within the 4th section of the Statute of Frauds (per *Parke*, B., and *Alderson*, B.), that it was a question of fact for the jury, whether, under the above circumstances, the purser held the mine and machinery in trust to employ the machinery in working the mine and making a profit of it for the benefit of the co-adventurers, who were to share the profits only, in which case the shares might be bargained and transferred by parol; or whether the purser held the mine in trust for himself and the co-adventurers, present and future, in proportion to their number of shares; and, if there was a direct trust in the realty, and consequently neither a bargain for, nor a transfer of, a share in such trust could be made without a note in writing.

A share in a joint-stock mining company is not goods, wares, or merchandise within the 17th section of the Statute of Frauds.

igned by the defendant. The defendant having delivered the shares, the plaintiff was obliged to purchase at an increased price. The Boscean mine was sold, and was conducted on "The Cost Book Principle;" defendant denied that any such contract was made. Also called as a witness Samuel York, the purchaser, who produced two indentures, both dated 11 November, 1850. One of these indentures was made between C. Ellis of the one part, and S. York of the other part, after reciting that C. Ellis was seised of one part of and in all mines, metals, and minerals under the tenement and premises called Higher Boscean; witnessed that, in consideration of the payments, after mentioned, C. Ellis "doth hereby grant and he said S. York, his executors, administrators, co-heirs, and assigns, full license, power, and authority to search for tin and tin ore, copper ore, lead and lead ore, and all other ores, minerals whatsoever in and throughout all that tenement and premises, situate &c., called Higher Boscean (being it); and all tin and tin ore, copper and copper ore, lead and lead ore, and all other ores, minerals, and metals shall be found within the said limits, to raise to grass, spall, thump, dress, cleanse, make merchantable and fit for sale; and subject to the reservations, conditions, and agreements hereinafter contained the right of persons lawfully claiming royal mines, to buy and dispose of the same to his and their own use." Habendum, "unto the said S. York, his executors, administrators, co-adventurers and assigns, from the date of the full term of twenty-one years," subject to certain conditions.

The other indenture, which was between several persons of the one part, and S. York of the second part, reciting that the parties of the first part were seised of eleven-twelfth parts of and in the under-lying and produce of the tenement, farm, and pre-

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mises called Higher Boscean, witnessed, that the several parties thereto of the first part, for the considerations therein mentioned, did grant and sell unto the said S. York, his executors, administrators, co-adventurers, and assigns, full license, power, and authority to dig, work, mine, and search for tin and tin ore, copper and copper ore, lead and lead ore, and all other ores, minerals, and metals whatsoever in and throughout all the eleven-twelfth parts of and in all the tenement, farm, and premises called Higher Boscean, on the same terms and subject to the same covenants as in the other deed.

"The Cost Book of the Boscean Mine was given in evidence, and the following extracts read:—

"At a Meeting of Adventurers in the new concern of 'Wheal Boscean' held at the account house on Tuesday the 4th of June, 1850, pursuant to notice.

"It was resolved—

"That the bargain made by Mr. York for the purchase of the mine and materials, at the sum of thirteen hundred and sixty pounds, less the value of such as have been sold, be approved and confirmed.

"That Captain John Carthew be appointed to look into what may be wanting, and give in a valuation of the same accordingly. That he be also appointed to give such directions, employ such persons, and order such materials as he may think necessary for getting the large engine and the flat rods in working order, also the proposed new engine shaft and the Goldings' shaft.

"That another meeting of adventurers be held at the account house on an early day, of which due notice is to be given.

"That Mr. Samuel York, of Penzance, be appointed the purser, and that he procure immediately a cost book into which the present minutes shall be copied, and that he also order new setts from the Lords.

"Resolved also,
"That a call be made immediately of ten pounds per 120th share.

[Then followed a list of shareholders present.]

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FIRST CALL MADE OF £10 PER SHARE.							
Paid - -	Mr. Samuel York	- -	13/120	130	0	0	
Cr. in Ac.	" Thomas Coulson	- -	12/	120	0	0	
Paid 40/.	" Richard Langon	- -	8/	80	0	0	
Paid - -	" James Ackerman	- -	8/	80	0	0	
Paid - -	" William Parry	- -	6/	60	0	0	

[Then followed the names of other persons holding shares, in various proportions, making in all thirty-three adventurers.]

"16th April 1851—At a meeting of adventurers held as above, pursuant to notice, the foregoing accounts for four months to the end of January, shewing a balance against the adventurers of five hundred pounds, were seen, examined, and approved.

"And it was resolved,

"That a call should be made on the adventurers of six hundred pounds or five pounds per each 120th share.

"And that in future the mine be divided into 240ths instead of 120ths as heretofore. The purser having secured the adjoining sett of Lord Falmouth, that the same be approved, and that the agents be instructed to immediately commence operations for the effectual working of the same.

(Signed by the Shareholders present.)"

The form of transfer of shares, which was also given in evidence, was as follows :—

"To Mr. Samuel York, purser of Boscean mine, in the parish of Saint Just, in the county of Cornwall.

"I, Peregrine Joyce, of &c., do hereby certify, that I have this day sold unto John Beall, of &c., four two hundred and

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fortieth parts or shares of and in a certain mine or adventure called Boscean, situate &c., together with the like shares or proportions of and in all the engines and tools, tackle, materials, ores, halvans, monies, and all other appurtenances thereunto belonging, together with all dividends and advantages to be derived therefrom. And this is your authority for transferring the said parts or shares into his name in the usual way.—As witness my hand this 1st day of August, 1852. PEREGRINE JOYCE

“Thomas Porter, Witness.”

“I, the above-named John Beall, do hereby accept the said parts or shares, subject to the same terms and conditions, rules, and regulations, as the said Peregrine Joyce held the same. JOHN BEALE”

“Willam Hughes, Witness.”

Under the authority of such a transfer, the purser substituted the name of the vendee for that of the vendor in the cost book.

Mr. York, in his examination, also stated, that sometimes the sharholders signed off their shares in the cost book; and that when they did so, they were considered out of the company or partnership, and there was paid to them the value of their shares. That, to estimate this value, there was taken into consideration the steam engines, the tools and materials, and the ore which had been brought to the surface, but not the mine itself; and that under such circumstances the mine with the minerals in it was considered of no value.

Upon the above evidence, it was submitted on behalf of the defendant, that this was either a contract for the sale of an interest in land within the 4th section of the Statute of Frauds, 29 Car. 2, c. 3; or that it was a contract for the sale of goods, wares, or merchandizes within the 17th section of that statute. The learned Judge overruled the objection, proposing to reserve leave to the defendant to move to enter a nonsuit; but that being objected to by the plain-

tiff's counsel, a verdict was found for the plaintiff, with 50*l.* damages.

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Crowder in the following Term obtained a rule nisi to set aside the verdict, and for a new trial on the ground of misdirection (a); against which

Montagu Chambers and *Hawkins* shewed caused in last Easter Term, (April 29 and May 2.)—First, this was not a contract for the sale of an interest in land within the 4th section of the Statute of Frauds, 29 Car. 2, c. 3. The indentures of the 2nd November 1850, merely granted to the pursuer and his co-adventurers a *license* to dig and search for ore and carry away the same. The case resembles that of *Doe d. Hanley v. Wood* (b) where the owner of the fee granted to A., his partners, fellow-adventurers, &c., free liberty to dig for tin and all other metals throughout certain lands therein described, and to raise, make merchantable, and dispose of the same to their own use; and to make adits, &c., necessary for the exercise of that liberty, together with the use of all waters and water-courses, excepting to the grantor liberty for driving any new adit within the lands thereby *granted*, and to convey any water-course over the premises granted, habendum for twenty-one years. There was a covenant by the grantee to pay one-eighth share of all ore to the grantor, and all rates, taxes, &c., and to work effectually the mines during the term; and then in failure of the performance of any of the covenants, a right of re-entry was reserved to the grantor: and it was held that this deed did not amount to a lease, but contained a mere license to dig and search for minerals, and that the grantee could not maintain an ejectment for mines lying within the limits of the sett, but not connected with the

(a) The rule was also obtained as to the measure of damages; but on the ground, that the learned Judge had misdirected the jury that point was abandoned.

(b) 2 B. & Ald. 724.

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workings of the grantee. The term "purchase of the mine" in the resolution of the 4th June, 1850, as explained by the evidence of the purser, means the purchase of the machinery and apparatus for working the mine and not the soil itself. The resolution of the 16th April, 1851, shews that this is a mere trading partnership, in which the shareholders have no interest in the mine itself, but only a right to participate in the profits of the adventure. *Vice v. Lady Anson* (a) is an express authority that the certificate of transfer does not pass any interest in the land. There the defendant had paid money for shares in a similar mine, and had received a certificate that she was a proprietor of those shares, and she had acknowledged that she was a shareholder, but no assignment of any interest in the mine had been made to her, and it was held that she was not liable for goods supplied for the purpose of working the mine. [*Alderson*, B., referred to *Bligh v. Brent* (b).] In *Jefferys v. Smith* (c) a receiver was appointed of mines in which several persons were interested, on the ground that the concern, from the nature of the subject, was a species of trade, and not a mere tenancy in common in land. Cases to the same effect are collected in *Fereday v. Wightwick* (d). The purchaser of shares in a mining company is not entitled to a regular abstract of title to the mines themselves as if he were purchasing a share in the land in which they are worked; but only to such evidence of the constitution of the company and of the nature of the title under which the mines are worked, as will shew that the subject matter of the purchase is what it professes to be, and that the proposed form of transfer will give him a valid title to the shares: *Curling v. Flight* (e). The defendant relies on the case of *Boyce v. Greene* (f), but there the company were possessed

(a) 7 B. & C. 409.

(b) 2 Y. & C. 268.

(c) 1 J. & W. 298.

(d) 1 Russ. & My. 45.

(e) 2 Ph. 613.

(f) Batty's Ir. Rep. 608.

of the land itself, and under their private Act of Parliament a purchaser of shares acquired an interest in the land.

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Secondly; this was not a contract for the sale of goods, wares, or merchandizes, within the 17th section of the Statute of Frauds. Shares in a joint-stock banking company are not within that enactment: *Humble v. Mitchell* (a); neither are shares in a railway company: *Duncuft v. Albrecht* (b); and there is no distinction in principle between those cases and this. In *Duncuft v. Albrecht*, Sir L. Shadwell, V. C., considered the true test to be, whether the subject-matter of sale is capable of part delivery.—They also referred to *Hibblewhite v. M'Morina* (c).

Montague Smith and Garth in support of the rule.—This was a contract for the sale of an interest in land within the 4th section of the Statute of Frauds. Whether the interest be corporeal or incorporeal, legal or equitable, it is equally within the statute. Here there is a grant of an incorporeal hereditament to York, as a trustee for himself and his co-adventurers. *Doe d. Hanley v. Wood* (d) only decided that where there has been a grant of a license to dig for minerals, the grantee cannot maintain ejectment before entry. The effect of that case was discussed in *Muskett v. Hill* (e), where a similar instrument was held to operate, not merely as a license but as a grant also, and to pass an interest which was capable of being assigned. The right to search for minerals constitutes an hereditament in respect of which use and occupation may be maintained: *Jones v. Reynolds* (f). It is a well-established principle, that, where a person purchases an estate with the money of another, there is a resulting trust in favour of the latter: *Sug. Vend. and Pur.*, p. 908, 11th edit.; *Story's Equity Jurisprudence*, Vol. ii., p. 634, s. 1201. The resolution of the 4th

(a) 11 A. & E. 205.

(b) 12 Sim. 189.

(c) 6 M. & W. 200.

(d) 2 B. & Ald. 724.

(e) 5 Bing. N. C. 694.

(f) 4 A. & E. 805.

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of June, 1850, shews that the mine was purchased with the money of the adventurers. Then each adventurer had an equitable interest in the realty, which was capable of being transferred; and the mere payment of the purchase money, without any conveyance, would operate as a transfer of it: 1 Saund. on Uses, p. 377, 5th edit. In Bainbridge on Mines, p. 75, it is said, "There can be no doubt that mines and minerals, whether forming a distinct possession or inheritance or not, are within the provisions of this statute. In either case they form part of the land itself." Again, at p. 81, the same author, after stating that "a license or liberty to work mines is very usual in mining countries," says, "It is submitted that licenses of this description are directly within the meaning of the statute, and that this opinion rests upon reasons very different from those applicable to some of the cases which have been decided upon the subject of licenses generally." *Boyce v. Greene* (a) is an authority in point. There it was decided that a sale of shares in the *Mining Company of Ireland*, who were possessed of mines and other real property, and which shares were made transferable by a private Act of Parliament, is a sale of an interest in lands within the Statute of Frauds. *Bushe*, C. J., in delivering judgment says,—“The nature of mining implies, at least, a right to open the ground, and keep it open, and such right to the land for a limited time and purpose, as induced the Court, in *Crosby v. Wadsworth* (b), to hold a contract for the sale of a growing crop to be within the statute.” The argument, that each shareholder in a mine of this description has only an interest in the profits, would have applied equally to that case. *Baxter v. Brown* (c) is also an authority in point. There, several persons joined in partnership to work a fulling mill, and subscribed money, with part of which freehold land was bought and conveyed to two of the partners in fee, and with other part a mill

(a) Batty's Ir. Rep. 608. (b) 6 East, 602. (c) 7 M. & Gr. 198.

was built on the land. By the partnership deed, it was declared, that the two partners should stand seised and possessed of all the estates, property, &c., upon trust for the benefit of themselves and their partners, as part of their partnership joint stock in trade, and that the land, mill, &c., should be deemed and considered as, or in the nature of, personal estate, and not real estate; and it was held, that each partner had an interest in the realty corresponding with the amount of shares held by him in the partnership. [Martin, B.—In *Colt v. Nettervill* (a), the question was, whether an agreement for the sale of certain stock was within the Statute of Frauds, and Lord King, C., refused to decide the point on demurrer; because, in *Pickering v. Appleby* (b), the same question was before all the Judges of England, who were equally divided.] No doubt a Court of equity, in adjudicating on the rights of the shareholders inter se, would treat the real estate as personalty, and consider the lease of the mine as the mere substratum of an adventure, in the profits of which the shareholders were concerned: *Jackson v. Jackson* (c). But the mode in which a Court of equity would deal with the property cannot change its nature with reference to the Statute of Frauds. Although the real estate of a partnership is, in equity, personal estate, the share of a deceased partner is not personalty as respects probate duty: *Custance v. Bradshaw* (d). *Bligh v. Brent* (e) was the case of a corporation, and it is clear that the individual corporators have no interest in the land. *Bradley v. Holdsworth* (f) was also the case of a corporation; and besides, the Act incorporating the company expressly declared, that the shares in the undertaking should be deemed personal estate. In *Humble v. Mitchell* (g), the evidence did not raise this point. In *Vice v. Lady Anson* (h), there was no transfer of the shares to the defendant, but only a

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(a) 2 P. Wms. 303.

(b) Com. 354.

(c) 9 Ves. 597.

(d) 4 Hare, 315.

(e) 2 Y. & C. 268.

(f) 3 M. & W. 422.

(g) 11 A. & E. 205.

(h) 7 B. & C. 409.

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delivery to her of a scrip certificate. In *Curling v. Flight* (a) the only question was, as to what title a purchaser of shares in a mine had a right to require.—(They admitted, that the second objection could not be supported.)

Cur. adv. vult.

The learned Judges, having differed in opinion, now delivered their judgments seriatim.

MARTIN, B.—This was an action tried before me, at the Sittings at Guildhall after last Michaelmas Term, when a verdict was found for the plaintiff with 50*l.* damages. The action was for the non-delivery of five Boscean mining shares: the plea was non assumpsit. The Boscean mine was in Cornwall, and was conducted upon what is called “The Cost Book principle,” and the only disputed question of fact at the trial was, whether a parol contract for the absolute delivery of the five shares was really made. The jury found a verdict for the plaintiff. The defendant, however called a Mr. York as a witness, who produced two grants to himself, both dated the 2nd November, 1850, whereby there was granted to him, his executors, administrators, co-adventurers, and assigns, full license, power, and authority to dig, work, mine, and search for tin and tin ore, copper and copper ore, lead and lead ore, and all other ores, minerals, and metals whatsoever, in and throughout certain limits therein mentioned, and all such ores, minerals, and metals to carry away and dispose of to his and their use, for the term of twenty-one years, subject to certain reservations to the grantors.

Mr. Yorke also produced the cost book of the Boscean mine. The first entry set out the names of the owners of the shares, which, in the first instance, were 120, and the respective number held by each shareholder. Mr. York held thirteen 120ths, Mr. Coulson twelve 120ths, and various

(a) 2 Ph. 613.

other persons the remainder, in different proportions. The entry then declared that the purchase or take by Mr. York of the above grants was approved of and confirmed. That a Mr. Carthrew should be appointed to look into what might be wanting and give in a valuation of the same, &c. That Mr. York should be appointed purser, and that a call of 10*l.* per 120th share be made.

Another entry was also read in evidence, which declared another call of 5*l.* in respect of each 120th share, and that in future the mine should be divided into 240 shares, and not 120 as before. Mr. York also produced the form of a certificate of the sale of a share in the mine; upon the authority of which the captain or purser of the mine substituted the name of the vendee in lieu of that of the vendor in the cost book. The form was as follows: (his Lordship read the form (a) and proceeded): Mr. York in his examination also stated, that sometimes the shareholders signed off their shares in the cost book, and that when they did so, they were considered out of the company or partnership, and there was paid to them the value of their shares. That, to estimate this value, there was taken into consideration the steam engines, the tools and materials, and the ore which had been brought to the surface, but not the mine itself; and that, under such circumstances, the mine with the minerals in it was considered of no value.

It was not proved, that the defendant had any share in the mine, or any interest in it, or that he was authorised to sell the shares by any one who had; and the transaction, no doubt, really was a mere speculative sale of, or rather a contract to procure, shares in the mine, and which, if no dispute had arisen between the parties, would probably have been settled by a payment of the difference between the contract price and the market price of the shares on the selling day in the mining share market.

(a) Ante, p. 225.

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Upon this evidence, it was submitted by the present Mr. Justice *Crowder*, who was counsel for the defendant at the trial, that the case fell within the 4th section of the Statute of Frauds, as a contract for the sale of an interest in land, or the 17th section, as a sale of goods; and the contract being by parol, the plaintiff ought to be nonsuited. I overruled the objection, offering the learned counsel leave to move to enter a nonsuit, but the counsel for the plaintiff refused to concur. A rule was granted for that alleged misdirection, and also as to a supposed misdirection as to the point of damages. It was not intimated by counsel on either side, that there was any question for the jury as to the point upon the Statute of Frauds. The question as to the existence of a contract was the subject of the most direct contradictory evidence, by both the plaintiff and the defendant, and the case was summed up at considerable length; but it was never intimated or suggested by counsel, either at the trial or on the argument on the rule, that there was any question for the jury with respect to the Statute of Frauds.

Cause was shewn against this rule during the last Term, and Mr. *M. Smith* and Mr. *Garth* then appeared as counsel for the defendant. Mr. *Smith* abandoned the point as to the damages, and also stated, that, after the decisions as to the 17th section of the Statute of Frauds, he could not sustain the objection as founded upon it; but he and Mr. *Garth* insisted, and argued with great ability, that the contract for the sale of a share in a mine, conducted according to the cost book principle in Cornwall, was a sale of an interest in land within the 4th section, and must be in writing, otherwise it was void.

The question is a very important one. Bargains for the sale of mining shares are very numerous every day in the mining share market; and it was stated by the witnesses at the trial, that it was not the practice to make written contracts in respect of them; but that generally each party made a memorandum of the sale in his own book, in the

same manner as is made by brokers or jobbers on the Stock Exchange. These entries would not satisfy the 4th section of the Statute of Frauds; and, if the argument on behalf of the defendant be well founded, the consequence will be, that parties dealing in this description of property will be obliged to alter their course of business, which, for a time at least, would be attended with inconvenience.

The partnership in mines, conducted according to the cost book principle, we believe to be pretty generally that which it appeared to be in the present instance. The legal right to the minerals, or the right to search for and get them within some given limit, is vested in some individual member or members of the partnership. The legal right in the present case was vested in Mr. York, and it was an incorporeal hereditament, which could only be created or transferred by deed: *Doe v. Wood* (a), *Muskett v. Hill* (b). The interest in the partnership is divided into a fixed number of shares, which are taken by the different members of the partnership, who contract with each other to supply the necessary capital in proportion to their respective shares. Each shareholder or partner has the right at his pleasure to sell his share, and insist upon his vendee being accepted as a member of the partnership in his place or stead. This is a right which does not exist in ordinary partnerships, and is the great essential difference between ordinary partnerships and joint stock partnerships, of which latter description mining companies on the cost book principle are instances. In this case there was no legal interest in the shareholders in the mines or minerals themselves; this was vested exclusively in Mr. York, for he had not executed any deed in favour of his co-adventurers or partners, and, as has already been observed, the legal interest could only have been conveyed out of him by deed. The operation of the first entry in the cost book would, however, probably make him a

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(b) 5 Bing. N. C. 694.

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trustee for himself and his co-adventurers in the interest created by the grants. It is obvious, however, that the partnership joint stock or property of such mining companies consists, not merely of the minerals, or the right to search for and obtain them, but also of the plant and machinery used to work the mine, which, together with the capital and the skill and labour exercised in the business, are all employed for the purpose of bringing the ore into the market the profitable sale of which is the ultimate object of the adventure. And the question in the present case is, whether a contract to sell a share in a joint stock company or partnership of this kind is a contract for the sale of lands tenements, or hereditaments, or any interest in or concerning them, within the 4th section of the Statute of Frauds 29 Car. 2, c. 3.

Joint stock companies of large capital, are generally created by Acts of Parliament, and are thereby made corporations. All the great railway companies, canal companies, and dock companies are such incorporated companies and are all possessed of land to a very great extent and value. Indeed, land or real property is the main substratum of their joint stock or partnership property, and the profits are directly obtained from its use. It is true, a legal interest in such real property is generally vested in the corporation, and not in the individual partner or partners as in the cost book mine; but the interest of a shareholder in the great incorporated joint-stock company and in the smallest mine conducted upon the cost book principle is, in its essential nature and quality, identical. In both, the shareholder has only the right to receive dividends payable on his share, that is, a right to his proportion of the profits arising from the employment of the joint stock, consisting indeed partly of land; but, whilst he holds his share, he has no interest or separate right to the land, or any part of it. He is, indeed, interested in the employment of it, but he cannot proceed against it directly,

for anything which is due to him, or make any part of it his own, for the purpose of satisfying any demand which he may have as shareholder. He is not in the situation of a mortgagee, who has a direct interest in the land; or of a joint tenant, or tenant in common, who may make a part of it his own in severalty. Upon a dissolution or determination of the joint concern, he may possibly, although not very probably, become an owner of a part or share in the land; but if he does, it is not by virtue of any term in the partnership agreement, but upon a new transaction whereby the parties to the joint concern may, by virtue of a new contract, become separate owners of separate shares in the land belonging to it. Upon his death nothing descends to his heir, all goes to his personal representative, whether the land be held for years or in fee simple; and his representative acquires no interest in the land different from what he himself had. Whether the legal interest in the land be vested in the corporate body, or in a member of the joint-stock company, or in a trustee for either, is a circumstance quite immaterial.

The interest of the shareholder in incorporated joint-stock companies, and the law as applicable to the sale of shares in them, has been the subject of legal decision, and is now well established. These shares have been held not to be an interest in land within the 4th section of the Statute of Frauds, or goods within the 17th. Their nature and character has been defined to be what has been above stated: *Bligh v. Brent* (a), *Duncuft v. Albrecht* (b); and the judgments of the learned Judges who decided these cases seem to me conclusive to shew that the true nature of the interest of a shareholder in a joint-stock company incorporated by an Act of Parliament (a part of whose capital stock is land,) is such as is above described, and that it is not an interest in land within the meaning of the 4th

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(b) 12 Sim. 189.

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section of the Statute of Frauds. It is true, that the employment and use of land are essential to the profit of the undertaking, but land is merely a part of the stock capital, and the real substantial interest of the shareholder, and that which the share represents is the participation in, and the right to participate in, the profit of the trading partnership, in the joint-stock or capital of machinery and plant as well as land, together with skill and labour, largely combine.

This being the well-established law in regard to shares in incorporated joint-stock companies, the present question is, whether it be different in regard to shares in unincorporated ones. It would be unfortunate if it were found to be so. It would, as already observed, of necessity induce a new course of dealing from what has hitherto been in use in regard to this species of property, which would be inconvenient; and it would make a distinction between shares in one species of joint-stock companies and another, which persons not acquainted with the law would not likely appreciate or understand. I think, however, there is no such difference. In substance and reality, the interest of the shareholder in the mining unincorporated company and in the incorporated joint-stock company is exactly the same. In both it is an interest in the ultimate profit of the company; neither can the shareholder directly intermeddle with the land, and although apparently in a mining company the interest of the shareholder in land seems greater than in ordinary trading joint-stock companies, nevertheless almost all trading companies have holdings of land, and without them their business could not in general be carried on, as was observed by the *Vice-Chancellor* in *Hilton v. Giraud* (a). The share in a mining company consists of an interest in the machinery, the capital, the land, and the labour employed upon the mine, as well as in

(a) 1 De G. & S. 187.

mine itself. The employment of land may be, or may be supposed to be, greater in degree in mining companies, but the nature of the property in the share is the same as in the shares of other trading partnerships, into the capital of which land or the use of it does not so largely enter. I, therefore, am of opinion, upon principle and analogy, that a contract for the sale of a share in a mining company conducted upon the cost book principle is not one for the sale of land or an interest in it, within the 4th section of the Statute of Frauds.

But in reality the point has been decided by authority. The Mortmain Act, 9 Geo. 2, c. 36, prohibits lands, tenements, or hereditaments, or any interest therein, being devised by will for charitable uses. Any interest in land or real estate is within this Act: *Myers v. Perigal* (a). It is therefore clear, that if the share in a joint-stock company be devisable to a charitable use, a contract in writing cannot be necessary to create a valid contract for the sale of it, by virtue of the Statute of Frauds. In the case of *Sparling v. Parker* (b), it appeared that the testator devised to a charitable use, amongst other things, some shares in the Harrington Dock Company in Liverpool, and the question was whether these shares were within the Mortmain Act. The Harrington Dock Company was an unincorporated joint-stock company or partnership created by deed. It was possessed of or entitled to real estate to a very large extent, as part of its joint-stock and capital. It is obvious that a dock must of necessity be real property. The dock itself is real estate. It has generally been excavated and formed into a dock out of the solid earth; and, although as a dock it is filled with water, yet it is real estate, being land covered with water; and the profits of a dock company more immediately arise from the use of real property than do the profits of a mine. Lord Langdale, after time taken to consider, delivered judgment, that a share in this company was

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(a) 2 De G., Mac. & G. 599.

(b) 9 Beav. 450.

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not within the Mortmain Act. After stating that the Harrington Dock Company was possessed or entitled to real estate to a very large extent as part of its joint stock or capital, he proceeded to say, that each shareholder had an interest in the undivided portion of the aggregate capital, and some interest in the real estate which constituted part of that aggregate, that is, an interest that so much of the joint stock as consisted of land should be employed for the best advantage of the joint concern, and an interest in the clear produce which might arise from the sale of the joint stock, including the land, in case the joint concern should be determined, and the affairs thereof wound up and settled. He then proceeded to describe the interest in the shareholder in the share to be that which has been already mentioned in this judgment, and concluded by stating, that, in his opinion, a shareholder in such a joint-stock company as the Harrington Dock Company had not such an interest or estate in land as fell within the meaning of the Mortmain Act. Now this case seems to be in point, for if a share in an unincorporated joint-stock dock company is not an interest in land for the purpose of a devise to a charitable use, neither it nor a share in a joint-stock mining company can be an interest in the land for the purpose of a contract within the 4th section of the Statute of Frauds. In the case of *Myers v. Perigal*, before referred to, there will be found a very learned judgment of Lord *St. Leonards*. He there describes the nature of a share in a joint-stock company part of whose capital is land, which entirely agrees with the judgment of Lord *Langdale* in *Sparling v Parker*. He also refers to the case of *Baxter v. Brown*(a) which was much pressed upon us. In reality, that case decided no more than that the several owners of a fulling mill, used by a joint-stock company, had the right to vote for the West Riding of Yorkshire, in which it was situated in the same manner as the member of a common partnership would have had in respect of their counting-house and

(a) 7 M. & Gr. 198.

warehouse, provided they were of the sufficient value. The fulling mill was liable to be rated as real property, and why should the circumstance of its belonging to a great number of persons affect the right to the franchise, provided the separate interest of each in the real estate was of the required value. A great number of other cases were cited on the argument, more or less bearing upon the question; with the exception however of *Boyce v. Greene* (b), none of them were any direct authority. This case was decided earlier than *Bligh v. Brent*, and *Sparling v. Parker*, and the arguments and principle which led to the judgments in these two cases were not at all submitted to the Irish Court of Queen's Bench. I consider the principle of these decisions to be correct, and that it is our duty to act upon them. The form of the certificate of transfer was much relied upon, but there is nothing contained in it at all inconsistent with my view. My judgment, however, is founded upon the essential nature and quality of a share in a joint-stock company, and the form which is used in any particular case to effect the transfer of it cannot have any real bearing upon the question.

I do not think it was proved that any one of the shareholders in this mine, except Mr. York, had any interest in land within the 4th section of the Statute of Frauds. If such an interest were necessary to entitle them to their shares, the consequence would be, that none of them had any interest in the undertaking at all, for Mr. York executed no writing whereby to transfer any interest to them. If it were proved that the shareholders in such a mine were joint tenants or tenants in common of the corpus of the mine, or of the incorporeal tenement creating the right to take the minerals, it is clear that such shareholders could not contract to transfer their interest without a writing, or, indeed, in the latter case to transfer without a deed. But I do not think that this state of things was proved to exist in this mine, nor do I believe it to exist in general in mines

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conducted according to the cost book principle; and it certainly did not occur to the learned counsel for the defendant either at the trial or on the argument, that there was a question to be left to the jury in respect of the Statute of Frauds. It is proper to add, that there are two cases in the Queen's Bench, *Northey v. Johnson* (a), the other of this Court, *Courteis v. Johnson* (b), both of which are founded upon the principle, that a contract for the sale or transfer of a share in a cost book mine need not be in writing.

PLATT, B.—I am also of opinion that the interest of a shareholder in a mine of this description is an interest in a

(a) 20 April, 1852.

(b) This cause was tried before *Talfourd, J.*, at the Exeter Summer Assizes, 1853. It was an action for goods sold, against the defendant as a shareholder in a company for working a mine in Cornwall, called "The West Down Mine." The mine was conducted on the cost book principle; and the case on the part of the defendant was, that, according to a usage which prevailed in mines of this description, he had abandoned his shares before the goods in question were supplied. Upon this point, however, there was conflicting evidence, and a verdict was found for the plaintiff. A rule nisi was obtained for a new trial, on the ground of misdirection; against which *Crowder* and *Carter* shewed cause in last Hilary Term, (January 23), and *Slade* and *C. Saunders* were heard in support of the rule. On the following day the Court made the rule absolute; when

Parke, B., said—At common law one partner in a partnership for an indefinite term could not determine his liability to future

contracts of the partnership by assigning his shares to another or giving notice to the other partners of the concern that he abandoned his shares, but that it was necessary for him to give notice of such his intention to his co-partners; for each co-partner had a right to consider, after notice, whether he will co-partner or not himself, when he can have no remedy against the other partner. If the case rested on the common law, the question would be whether the defendant gave notice to *all* the shareholders or not, that he meant to cease to be a copartner. There seemed no sufficient evidence of this on the trial. But if by usage these mining partnerships are determinable by each partner, by transferring his share to another, or abandoning the *purser*, then the question would be, whether either transfer or abandonment had been taken place. But the learned Judge left only the first question, which was the principal contest at the trial, and before the summing up was

Proportionate part of the profits of the adventure, and not an interest in land within the 4th section of the Statute of Frauds. It seems to me that the subject-matter conveyed by the certificate of transfer which has been adverted to, is a share in the minerals and machinery not fixed to the freehold, which is clearly a chattel interest. I therefore think that the verdict is perfectly right.

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ALDERSON, B.—I am of the same opinion. The principle is perfectly clear. If each shareholder in the mine has a joint interest in the land itself, that interest cannot pass except by the mode prescribed by the 4th section of the Statute of Frauds. But if, on the other hand, each shareholder has merely a right to a divisible proportion of the profits of the adventure, and no interest in the land, then the case is not within that enactment. This principle was well considered in the judgment of this Court in *Bligh v. Brent*(a). There it was pointed out, that where the land is vested in the shareholders, and the corporation has only the management of it, as in the case of the *New River Company*(b), each individual shareholder has a definite portion of the land, for which he could maintain ejectment; but where, as in the case of *Bligh v. Brent*, the joint stock money is entrusted to a corporation, who have the management of it, and the surplus profits alone are divisible among the individual corporators, there the land is only the instrument whereby the joint stock money is made to produce a profit. The question is, whether the facts proved bring this case within the one or other of those decisions. It seems to me to fall within the latter, and that the land is merely an instrument for working out the profits, in which alone the shareholders have any interest. The mode of conveyance adopted is that of a grant of an interest, not in the land itself, but of all the profit to be derived from the use of the land; and the form of transfer of shares also shews that the vendor does not assign a portion of the land, but a chattel interest only. At all events, it is a question

(a) 2 Y. & C. 294.

(b) *Townsend v. Ash*, 3 Atk. 336.

of fact, which a defendant has a right to have submitted to the jury; and the mode of transferring these shares in the mining market is one circumstance by which the jury may arrive at a conclusion.

PARKE, B.—The principle on which this case should be decided is perfectly clear, and the only doubt felt by any member of the Court is upon a question of fact, viz. under which class of decided cases this particular case falls.

In the case of joint-stock companies incorporated by Acts of Parliament, who are generally possessed of land, the individual shareholders are quite distinct from the corporation. The shareholders are entitled to no direct interest in the land, no part of the realty is held in trust for them, but all they are entitled to is, that the real and personal property held by the corporation should be used by them for their benefit, so as to make profits, which, when made, are to be divided between them rateably, according to their number of shares, as personalty which might be disposed of by unattested will, (before the late Statute of Wills), and consequently could have been disposed of by parol. This was decided in *Bligh v. Brent* (a), a case which we believe has been universally acquiesced in and followed by several other cases, amongst others, *Hilton v. Geraud* (b).

Nor is it to those cases only of joint-stock companies which are incorporated, and in which therefore the corporation is seised of the real estate, that this doctrine is applicable. It applies also to other joint-stock companies, where the persons seised of the realty hold in the same way as the corporation in those cases, that is, in trust only to use the land, make profits as part of the stock in trade, and then to divide those profits between the shareholders, whose only interest is in those profits.

The cases decided under the Mortmain Act are of this nature. That of *Sparling v. Parker* was one; it was before Lord Langdale, the then Master of the Rolls, and is

(a) 2 Y. & C. 294.

(b) 1 De G. & S. 167.

reported in 9 Beav. 450. It was there held, that shares in an unincorporated gas light company, where the lands are expressly stated to be vested in trustees, and the shares are declared to be personal estate by the partnership deed, were personalty. So, shares in a dock, where the shareholders were interested in the profits and losses: in whom the real estate was vested does not appear by the report, but, doubtless, not in each partner, but in some one or more trustees. In like manner shares in a banking company, where the shareholders were entitled to the profits only, and the real estate was vested in trustees, were held not to be within the Mortmain Acts, first by the Court of Common Pleas in *Myers v. Perigal*(a), and confirmed by Lord St. Leonards(b).

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In the case of *Baxter v. Brown*(c), where there was a tulling mill held by trustees for the copartners under a partnership deed, the Court, on the construction of that deed, held that there was a trust of the real estate for each copartner, and each copartner was held to be entitled to vote. Lord St. Leonards(b) evidently is dissatisfied with that decision; but if the construction of the instrument was correct, and there was a direct trust of the real estate for each partner in proportion to their shares, the decision was no doubt perfectly right.

The question, therefore, in this case, is simply within which class of decisions is this joint-stock company to be placed. That is a question of fact, and upon which myself and my Brothers are not agreed. I think it ought to have been left to the jury, as any question of fact ought to be, and we cannot decide it for ourselves. If, indeed, the point had been reserved so as to leave to the Court to draw inferences of fact, we might have determined this point ourselves; but the plaintiff refused his consent to the reservation of this point, and no such reservation can take place without the consent of both parties.

If the purser of the mine, who had himself the let or

(a) 11 C. B. 90. (b) 2 De G., Mac. & G. 599. (c) 7 M. & Gr. 198.

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grant of the mine. had the mine and the machines and plant vested in him, in trust to employ the machinery in working the mine and making the most profit of it for the benefit of the co-adventurers, who were to share the profit only, such interest was transferable by parol, and might be bargained for by parol.

If he held the mine in trust for himself and the co-adventurers present and future in proportion to their number of shares, then there was a direct trust in the reality, for the right to get the minerals was a real right, and could not be granted without deed, nor a trust in it transferred without note in writing, nor a bargain be made for a share of that direct trust without note in writing. This is clearly a question of fact, and depends on the evidence as to what was the mutual agreement of the parties. There is something to be said in favour of both views. The mode of transferring shares proved, namely, by a letter to the purser announcing a previous sale of the holder's share to another, and an entry in the cost book thereupon, favours the idea that the shareholders considered that no interest in the soil passed, for otherwise it would be invalid. The tenor of the letter strongly shews that a definite share of the mine itself, and of the engines, tools, and plant, as well as of the profits to be derived therefrom, were intended to pass. I think this much stronger evidence of the interest than the fact of transferring by parol, for such arrangement may be deemed to have been made to save the expense of a regular transfer, and defraud the Government of the stamp duty. In *Poll v. Lee(a)*, in which there was a question as to the proprietorship in a cost book mine, the form of one of these letters is given, which agrees with that given in evidence in this case as to the thing transferred, but refers not merely to a sale, but to a deed of transfer *already executed*, as if that were necessary.

I think it clear that this question ought to have been submitted to the jury.

Rule discharged.

(a) 4 Exch. 230.

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THIS was an action by the Churchwardens and Overseers of the Poor of the Parish of East Retford, in the county of Nottingham, against the defendant, on a bond conditioned for the faithful execution by one John Piercy of the office of assistant overseer of the poor of the said parish. By consent of the parties, and by order of a Judge, the following case was stated for the opinion of this Court, without any pleadings:—In 1843, the said J. Piercy was, according to the provisions of the statute 59 Geo. 3, c. 12, nominated and elected by the vestry of the said parish, and appointed by two justices of the borough of East Retford, assistant overseer of the poor of the said parish, at a yearly salary of sixpence in the pound, upon the rates annually collected by him. Such nomination, election, and appointment were not limited to any particular period, but were made generally, and security was, according to the said statute, taken for the faithful execution of the said office, by a bond with

The acceptance by the holder of one office of another incompatible office, does not vacate the former, unless it be such as he could determine by his own act simply, or unless that authority concurred in the new appointment, which could accept the surrender of or remove from the old one.

In the year 1843, P. was, according to the provisions of the 59 Geo. 3, c. 12, s. 7, nominated and elected by the vestry of a certain parish, and appointed by two justices, assistant overseer of that parish. The warrant of appointment defined the duties of assistant overseer, one of which was, to account, when required by the overseers or vestry, for money received or expended, to the persons authorised to receive the same. By the above statute, every person so appointed is to continue assistant overseer until he shall resign such office, or until his appointment shall be revoked by the vestry. Security was, according to the statute, taken for the faithful execution of the office by bond with sureties, made to the churchwardens and overseers of the parish. P. continued to act in the execution of such office until March, 1852, when he resigned. In the year 1847, P. was appointed one of the overseers of the same parish, and he was afterwards, from year to year, re-appointed and acted as such until 1852. P. having made default in accounting for monies received by him as assistant overseer, and an action having been brought on the bond against one of the sureties.—*Held*, first, that assuming the two offices to be incompatible (which they were not), the acceptance of the office of overseer did not vacate that of assistant overseer, since the holder could not divest himself of the latter office by his own act simply,—the word *resign* in the statute meaning a formal notification to the vestry of the act of giving up the office; and since, also, there was no implied motion from the old by appointment to the new office, for the authority appointing to that office could not remove; nor was there any implied surrender, because the same authority could not accept a surrender of the old office.

Secondly, that, if the offices were incompatible, the appointment as overseer would be either void or voidable only, in which case it would be vacated on appeal.

Thirdly, that, as the assistant overseer was not bound to account to the overseers, his appointment as overseer did not make such an alteration in the mode of accounting as would affect the liability of the sureties.

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sureties, made to the then churchwardens and overseers the poor of the said parish.

[The case then set out the bond, which was in the pen sum of 200*l.*, to be paid to the said churchwardens and overseers, and their successors, subject to the following condition:]—"Whereas, in and by an Act of Parliament made and passed in the 59th year of the reign of his late Majesty George the Third, intituled 'An Act to amend the Laws for the Relief of the Poor,' after giving certain powers and authorities for the nomination and election of select vestries in manner as therein mentioned, it was enacted, that it should be lawful for the inhabitants of any parish in vestry assembled to nominate and elect, and afterwards for two justices to appoint, any discreet person or persons to be assistant overseer or overseers of such parish, with such salary and under such regulations as in the said Act are directed; and that it shall be lawful for the inhabitants of any parish, upon the nomination and election by them of any assistant overseer or overseers, to require and take security for the faithful execution of his or their office by bond, with or without a surety or sureties, and in such penalty as they shall think fit; and every such bond shall be made to the churchwarden and overseers of the poor, and may, on any breach of the condition thereof, be put in suit by and in the name of the churchwardens and overseers of the poor for the time being by the direction of the vestry or select vestry, for the benefit of the parish, in manner as therein mentioned: And where the above-bounden J. Piercy hath been duly elected, nominated, and appointed assistant overseer of the said parish of East Retford, under and by virtue of the powers of the said Act of Parliament; and the above-bounden William Newton, John Cottom, &c., have agreed to be bound with him for the due execution of the said office in manner as hereinafter mentioned: Now, therefore, the condition of the above-written obligation is such, that, if the above-bounden J. Piercy shall, from time to time and at all times during the

continuance of his said appointment, or of any future appointment or appointments, make out the receipts from the rate books of such parish, and well and faithfully collect and get in all such rates or other sums of money as he may be directed to demand and obtain by virtue of his said office, and do also relieve all vagrants, and make such other payments out of the monies he shall so receive as he may be directed by the overseers for the time being of such parish and of the vestry or select vestry thereof, and do execute all orders of removal relating to or concerning the said parish, and do, from time to time and at all times when required by the said overseers for the time being or vestry or select vestry, render a just and true account of all monies received or expended by him to the person or persons duly authorised to receive the same, and pay over to him or them any balance that may be found due on such account or accounts, and do also faithfully and diligently execute his said office of assistant overseer in every other respect, according to the several directions, provisos, and regulations of the said recited Acts, or any other law or laws relating to the poor therein referred to or since passed or enacted, Then the within-written obligation shall be void," &c. The duties to be executed by the said J. Piercy under and according to his said nomination, election, and appointment were such duties as are mentioned in the condition of the said bond, and for performance of which the said bond is conditioned.

The said J. Piercy, immediately after execution of the said bond, entered upon his said office of assistant overseer of the poor of the said parish, and except so far (if at all) as his appointment of overseer hereinafter mentioned may have put an end to his being assistant overseer, thenceforth continued to act as in execution of such office, until the month of March, 1852, when he sent a notice in writing to the vestry of the said parish, purporting to be a resignation of the said office. The said J. Piercy from the time of his said appointment, until the sending in such notice of resignation as aforesaid, received the said yearly salary.

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In the year 1847, the said J. Piercy, being duly qualified in due form of law appointed to be one of the overseers of the poor of the said parish, and he was afterwards, in like manner, from year to year, re-appointed such overseer of the poor, until 1852, and acted as such during all that period. In the annual accounts kept by the overseers, and audited pursuant to the orders of the poor law board, during the years when the said J. Piercy was so appointed and served as overseer, the salary of the said J. Piercy as assistant overseer was regularly charged and allowed, and the same was regularly received by him until his said resignation of the latter office; and the said J. Piercy, after he had been appointed overseer, continued personally to collect the rates and do the several other acts described in the condition of the bond as the duties of the assistant overseer, in the same manner as he had done before such appointment, with the interference of his co-overseers.

In 1852, after the resignation of the said J. Piercy as such assistant overseer, it was discovered that a certain balance was due from him on account of rates and monies collected and received by him in and by virtue of his office as assistant overseer before the time of his appointment as one of the overseers of the poor of the said parish, and not duly accounted for or paid over, pursuant to the condition of the said bond; and that a certain other balance was due from him on account of the like rates and monies collected and received by him after his appointment as one of the overseers of the poor of the said parish and before his resignation of the office of assistant overseer, and not duly accounted for or paid over pursuant to the said condition; and the present action was brought to recover the amount of the said such balances against the defendant as one of the sureties on the said bond. The said balance so due from the said J. Piercy on account of the said rates and monies collected and received by him before he was appointed one of the overseers of the poor of the said parish, has been paid

Court by the defendant to the plaintiff, since this action was brought, as being recoverable upon and by virtue of the said bond.

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The question for the opinion of the Court is, whether the defendant is, or is not, liable upon the said bond in respect of the balance of the said rates and monies so collected and received by the said J. Piercy after his appointment as one of the overseers of the poor of the said parish. If the Court should be of opinion that the defendant is so liable, then judgment is to be given for the plaintiffs for the difference between the sum paid into Court and the penalty of the bond, with costs. If the Court should be of a different opinion, then judgment is to be given for the defendant with costs since the payment into Court.

Hayes argued for the plaintiffs (June 28).—The appointment of Piercy as overseer did not vacate his office as assistant overseer. By the 59 Geo. 3, c. 12, s. 7, the inhabitants of any parish in vestry assembled may nominate and elect a person to be assistant overseer, and specify his duties and fix his salary; and two justices are empowered to appoint the person so elected to be assistant-overseer for such purposes and with such salary as shall have been fixed by the vestry; and every person so appointed is to continue assistant-overseer until he shall resign such office, or until his appointment shall be revoked by the vestry. Therefore it is the vestry who elect the assistant-overseer, and the justices have only a ministerial function to perform. But by the 43 Eliz. c. 2, s. 1, the nomination of overseers is vested absolutely in the justices; and by sect. 6, a power of appeal is given to the Quarter Sessions. The two offices are not incompatible, and even if they were the former would prevail. In *Rex v. Patteson* (a), the defendant, who was an alderman and mayor of a city, and as mayor a

(a) 4 B. & Ad. 9.

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justice of the peace, accepted the office of treasurer; and was held, that the acceptance of the latter office did not vacate that of alderman and justice, though such acceptance might afford ground of motion from those offices. The rule there laid down is, that the acceptance of an incompatible office does not operate as an absolute avoidance of former office, in any case where the party could not divest himself of that office by his own act and without the concurrence of another authority to his resignation or motion unless such authority be privy and consenting to the second appointment. Here it is clear, that the justices have no power to revoke the appointment of assistant-overseer, as they are not the persons to whom his resignation is to be tendered. *Rex v. Gayer (a)* is similar to the present case. There the question was, whether the office of justice of the peace and the office of overseer were compatible; and though the Court gave no express opinion on the point they seem to have considered, that, if the two offices were incompatible, that of justice of the peace would not be vacated by the appointment to be overseer, but that the party would be exempt from the latter office. [*Martin*, 1] —Is not the surety prejudiced, inasmuch as he has a right to have an independent overseer to control the acts of the assistant-overseer? It is not every act which operates to the prejudice of a surety which will avoid a bond. If, instead of four overseers, two only had been appointed, that would in some degree have prejudiced the surety; but the bond would nevertheless be valid. Even if the two offices are incompatible, the defendant, who has performed the duties of assistant-overseer and received monies in that capacity, must remain liable to account.—He also referred to *Rex v. Derby (b)*.

Pashley for the defendant.—The two offices are incompatible.

(a) 1 Burr. 246.

(b) 13 East, 143.

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patible, and, if so, the second appointment vacates the first. An appointment of a churchwarden as overseer would be clearly bad under the statute 43 Eliz. c. 2. The same person cannot act both as justice and churchwarden: *Rex v. Great Yarmouth* (a). The duties of an overseer are—first, to make a rate; secondly, to ascertain what poor the place is bound to maintain; thirdly, to remove such persons as it is not bound to support; fourthly, to administer to the wants of their proper poor; fifthly, on going out of office, to make up and pass their accounts, and deliver over any balance in their hands to their successor: 1 Nolan's Poor Law, 59. None of those duties are delegated to the assistant-overseer. Though the major part of the churchwardens and overseers must make a poor-rate, yet, for the purpose of levying it, a demand by one overseer and complaint to the justices by one is sufficient: *Morrell v. Martin* (b). Modern statutes have attached to the office of overseer many important duties, in the performance of which they have to exercise a discretion: *Regina v. Kensington* (c). The acceptance of the office of overseer and acting under it was equivalent to a resignation of the office of assistant-overseer. [Parke, B.—According to the doctrine laid down in *Rex v. Patterson* (d), there is in this case no implied motion or implied resignation of the old office by appointment to the new one.]—The case falls within the other exception there pointed out, viz. where the office is determinable at the mere will of the party. *Rex v. Patterson* proceeded on the ground that the concurrence of another person was necessary to render the resignation valid. Here the assistant-overseer might at any time have determined his office by his own act. [Parke, B.—Not unless he notified his resignation to the vestry. Upon an issue whether he had resigned the office

(a) 6 B. & C. 646.

(b) 6 Bing. N. C. 373.

(c) 12 Q. B. 654.

(d) 4 B. & Ad. 9.

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of assistant-overseer, would it be evidence of the fact that he had accepted the office of overseer and acted under it. Formerly, it was considered, that, if two offices were incompatible, the acceptance of the higher of the two ipso facto vacated the other: *Rex v. Godwin* (a). But *Miward v. Thatcher* (b) decided that in such case the acceptance of the latter, though an inferior office, will vacate the former. *Rex v. Hughes* (c) and *Rex v. Tizzard* (d) are authorities to the same effect. One of the duties of the assistant-overseer was to collect the rates, and he was bound to account to the overseers. Where an alderman accepted the office of town clerk, and the town clerk's accounts were allowed by the aldermen, it was held that the offices were incompatible, and that the appointment to the office of town clerk was equivalent to an amotion from that of alderman: *Rex v. Pateman* (e). There Lord *Kenyon*, C.J. said, "In the case of *Rex v. Gayer* (f), it seemed to be agreed, that the offices of justice of the peace and overseer of the poor were incompatible, because the accounts of the latter were subject to the control of the former. Here the mode of accounting is altered, and consequently the risk of the sureties is increased. It is not like the case of a clerk who is afterwards appointed clerk to another person, but that of a clerk who becomes a member of the partnership firm.

Hayes in reply.—There could be no resignation of the office of assistant overseer by the mere will of the holder unless he communicated his intention to resign to the persons having the power to appoint to the office. If it is held, that the acceptance of the office of overseer avoids the former office, the consequence would be, that, if an

(a) 1 Dougl. 398, n.

(b) 2 T. R. 81.

(c) 5 B. & C. 886.

(d) 9 B. & C. 418.

(e) 2 T. R. 777.

(f) 1 Burr. 245.

verseer, who is a defaulter, was appointed overseer, and be no means of compelling him to account.

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Cur. adv. vult.

gment of the Court was now delivered by

; R.—The question is, whether the defendant is liable in breach of duty by Piercy, in the interval between his appointment as overseer in 1847, and his resignation of that office as assistant overseer in March, 1852. It is argued that these are incompatible appointments, and that, if the second appointment vacates the first; and if that the situation of the sureties is altered, and they are discharged as to this part of their liability.

In the first place, we are by no means satisfied that they are incompatible offices; we think they are not. When the court appointed Piercy the assistant overseer, under the 59 Geo. 3. c. 7, and the justices appointed him to perform the duties specified in the warrant, the overseer was legally entitled to perform all the remainder; and nothing inconsistent in the assistant overseer acting in that appointment, and doing the specified duties with and the regular overseers the remainder. It will be admitted that there is nothing in the Acts which obliges the assistant overseer to account to or obey the orders of the regular overseers. He appears to us an independent officer, and his connection with the regular overseers is in name only. If the offices are incompatible, the question whether the second appointment vacates the first, or itself is voidable, depends upon the application of the principle laid down in *Rex v. Patteson* (a). That principle was, that acceptance by the holder of one office of another incompatible one did not vacate the former, unless the holder such as he could determine by his own act *sim-*

(a) 4 B. & Ad. 1.

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ply, or 'unless that authority concurred in the new appointment which could accept the surrender of or remove from the old one. In such cases only, there would be an implied removal or surrender.

In this case, the office of assistant overseer was one which the vestry could nominate and elect a person, and two magistrates could appoint the person so nominated and elected, under 59 Geo. 3, c. 12, s. 6. The office of overseer of the poor was in the appointment of two justices of the peace, one being of the quorum, under the 43 Eliz. c. 2, and the power of removal can be exercised by the vestry only under the 7th section of the former Act. In this case therefore, there is no implied removal from the old by appointment to the new office, for the authority appointing that office could not remove; nor any implied surrender because the same authority could not accept a surrender of the old office.

But it was said, that this case was within the exception pointed out in *Reg. v. Patteson*, as any assistant overseer could determine his office by his own act; and if such an office was held at the mere pleasure of the holder and determinable at his will simply, there is no doubt that such an office would be within the exception, and the acceptance of a new incompatible office would be a determination of his will to retain the old one. But, to fall within the exception, the office must be one determinable simply by the act of the holder, indicating that he would hold it no longer. If a formal mode of determining the office is required by law, the holder cannot dispense with it of his own private authority.

Now, in this case, the statute, by the 7th section, provides "that the person appointed to be an overseer shall continue in that office until he shall *resign* such office, or the inhabitants in vestry assembled shall revoke it, and no longer." Now we think it clear, that the resignation here indicated is a resignation to the vestry, a formal notification of the

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act of giving up the office to which they have nominated him; upon which notification they may act and nominate another to succeed him, if they please. The simple will and pleasure of the holder to give up his office is not equivalent to this; and the statute does not contemplate the determination of the office in that mode. We therefore think the office of assistant overseer is not determined by the simple act of acceptance of an incompatible office.

The office, however, being assumed to be incompatible, the appointment to it is either altogether invalid and void, or voidable only. There can be no doubt, that, on that assumption, the appointment of overseer would be vacated on appeal, if it was not void. In either case the assistant ~~overseership~~ continues. Does, then, the condition of the bond apply to the time when the assistant overseer held both the offices of assistant overseer and overseer? If he acted as overseer and did all the acts in respect of which he is charged with defaults in the character of principal overseer, the bond does not apply. But we collect from the case that he still acted in every respect as assistant overseer, and regularly received his salary as such.

But then it is also said, that his mode of accounting was altered; and therefore, during the time he actually held both appointments, he was discharged on that account. But we do not see that any alteration was made in the mode of accounting by the appointment of Piercy to be overseer. The duties of an assistant overseer, in accounting and in every other respect, are defined in the warrant of appointment, which in this case are stated to be the same as those specified in the condition. The assistant overseer, by the condition, is to account, not to the overseers, but, when required by the overseers for the time being or the vestry or select vestry, he is to render a just and true account of all monies received or expended to the person or persons duly authorised to receive the same. Who those persons are is not stated in the bond.

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But he would have to account according to law; and the statute 4 & 5 Will. 4, c. 76, s. 47, then in force, contains provisions on this subject for accounting once a quarter and where the Poor Law Commissioners' orders are in force as often as they shall require, to guardians, auditors, or other persons appointed by them. By the 7 & Vict. c. 101, s. 32, the Commissioners may combine parishes and unions for the audit of accounts, and direct auditors to be elected for the district; but we cannot find an enactment which directs the assistant overseer to account to the regular overseers. The only alteration as to the accounting, which the appointment of the assistant overseer to be overseer makes, is, that, as overseer, he would be less likely to concur with the other overseers (of which the others would always be a majority) in calling on himself to account. But this is, we think, much too remote a contingency to affect the liability of the sureties. As we might it be said that a diminution of the number of overseers, which the magistrates might in their discretion make, would lessen the chance of being called on to account, and so discharge the sureties. Besides, the change is made not by the obligees in the bond, but by the justices.

Judgment for the plaintiffs.

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July 7.

THE declaration stated, that, at the time of the committing of the grievances &c., the plaintiffs were seised in fee of certain land, with certain houses, cottages, and other buildings erected, standing, and being thereon, which said land, houses, cottages, and other buildings were contiguous and near to certain other land, and the plaintiffs were entitled to the support of their said land, houses, cottages, and other buildings by the said land to which the same were so contiguous and near as aforesaid, and by the strata under the same, and also by the strata of minerals under their the plaintiffs' said land, of which last-mentioned strata they the plaintiffs were not seised, nor did the same belong to them. And the defendant wrongfully, carelessly, negligently, and improperly, and without leaving any proper or sufficient pillars or supports in that behalf, worked certain coal and other mines under the said land, houses, cottages, and other buildings of the plaintiffs, and under the said land so conti-

A declaration stated, that the plaintiffs were seised in fee of certain land and houses, which were contiguous to certain other land, and the plaintiffs were entitled to the support of their said land and houses by the said land to which the same were so contiguous, and by the strata under the same, and also by the strata of minerals under the plaintiffs' land; and the defendant

wrongfully, and without leaving any proper or sufficient pillars or supports, worked certain coal mines under the said land and houses of the plaintiffs, and under the land so contiguous to the same; by reason whereof, the soil and surface of the plaintiffs' land sunk in, and the houses became ruinous.—Plea: that, after the committing of the alleged grievance, by an agreement between the plaintiffs and the defendant, after reciting that an action had been commenced against the defendant to recover compensation for the injury to the said land and houses by the defendant working the mines under the same, it was agreed that all further proceedings in the action should be stayed, on the terms that the defendant should make good all damage done to the premises, and should repair the same to the satisfaction of a surveyor, and should pay the loss of rent until the premises should be restored, and also the costs of the action and of the surveyor. Averment of performance in the terms of the agreement, and that the performance was accepted by the plaintiff in satisfaction and discharge of the claim in the declaration. New assignment: that the plaintiffs sue not for the damages and injury in satisfaction and discharge of which the agreement was entered into, but for that, after the repairing, by reason of the same acts which caused the damage, the land on which the said houses were erected further sank, by reason whereof the houses so repaired, and other houses of the plaintiffs being on the same land, became ruinous. On demurrer, *Held*:—that the cause of action was not the damage done to the plaintiffs' land and houses by improperly working the mines, but the injury to the plaintiffs' right to have their land and houses supported by the contiguous land and strata of coal; and, therefore, when any part of the necessary support was removed, although no actual damage, there was a complete cause of action for which the plaintiffs might have recovered prospective damage, and no new cause of action arose from the subsequent damage; consequently, the agreement stated in the plea and its performance were a bar to the action.

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guous to the same as aforesaid, and dug for, got, and moved the coals, minerals, earth, and soil of and in the said mines; and by reason thereof the soil and surface of the land of the plaintiffs sank in, cracked, swagged, and gave way; and by reason thereof also the said houses, cottages, and other buildings gave way, cracked, sank, and were displaced and distorted, and became ruinous, fallen down, and destroyed, and the plaintiffs have been deprived, and are likely to be further deprived, of the beneficial use thereof.

Plea,—That, after the committing of the alleged grievances, and before this suit, it was agreed between the plaintiffs of the one part, and the defendant and one B. Wright, since deceased, of the other part, in manner following, that is to say:—After reciting that an action at law had been commenced against B. Wright and the defendant to recover compensation for the injury done to certain property, consisting of six houses, land, &c. (being the land, houses, cottages, and other buildings of the plaintiffs in the declaration mentioned) by the working of the mines under or adjoining the same by B. Wright and the defendant (the damages, injury, and claim in the declaration mentioned being the same damages and injury as in the said agreement mentioned, and no other or different), it was thereby agreed, that all further proceedings in the said action should be stayed upon the following terms, namely, that B. Wright and the defendant, within five months from the date thereof, should make good all damage done or occasioned to the said premises as aforesaid, and restore and put the same in substantial and thorough repair to the satisfaction of S. Powell, of &c., surveyor, and with such good and sufficient materials, and in such manner in all respects as he should require; and in case of default, B. Wright and the defendant should, at the expiration of the said period of five months, be liable to pay to the plaintiffs such a sum of money as S. Powell should thereupon certify to be equivalent to compensate the plaintiffs for the breach of the above

agreement, and that the same should be recoverable as liquidated damages: B. Wright and the defendant were further to pay and make up all loss of rent which then already, or which during the said period of five months, or until the said premises should be restored as aforesaid, should be occasioned in respect of the said premises by reason of the injury to the same as aforesaid, the amount thereby to be also settled and certified by S. Powell, and to be in like manner recoverable as liquidated damages. (It was then further provided that B. Wright and the defendants should pay the costs of the action and of the surveyor). Averments.—That the defendant and B. Wright did accordingly, in pursuance of the said agreement, within the space of five months and before this suit, make good all damages done or occasioned to the said premises as aforesaid, and restore and put the same in substantial and thorough repair to the satisfaction of S. Powell, and with such good and sufficient materials and in such manner in all respects as he required, and that the defendant and B. Wright did, in pursuance of the said agreement and before this suit, pay and make up all the loss of rent then, or which during the said period of five months, and until the said premises were restored as aforesaid, was occasioned by reason of the injury to the same as aforesaid, according to the settlement and certificate of S. Powell. (The plea then proceeded to state that the defendant and B. Wright paid the costs). That the performance of the said agreement was made by the defendant and B. Wright, and accepted and taken, before this suit by the plaintiffs, in full satisfaction and discharge of the claim in the declaration above mentioned.

New assignment.—That the plaintiffs sue not for the damages, injury, or claim, in satisfaction and discharge of which the agreement in the plea mentioned was entered into and performed, but for that, after the repairing in the plea mentioned, and before the commencement of this action, by reason of the same acts of the defendant which caused the da-

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mage in respect of which the agreement was entered into, being part of the acts in the declaration mentioned, the land on which the said houses, cottages, and other buildings in the declaration mentioned were erected, standing, and being, further sank in, cracked, swagged, and gave way, by reason whereof the said houses, cottages, and other buildings so repaired as in the plea mentioned, and other houses, cottages, and buildings of the plaintiffs, erected, standing, and being on the same land, gave way, cracked, sank, and were displaced and distorted, and became ruinous, fallen down, and destroyed.

Demurrer and joinder therein.

Phipson argued in support of the demurrer (June 16).—The new assignment is bad, since the subject-matter of the plea affords a complete answer to the action, and no new cause of action arose from the subsequent damage. The cause of action was the injury to the plaintiffs' right to have their land and houses supported by the contiguous land, and the strata of minerals under their land; and when the defendant wrongfully removed the support, the cause of action was complete, even though the damage might be nominal. The further sinking of the plaintiffs' land was only an additional injury arising from the same wrongful act. The plaintiffs might have recovered in the former action prospective as well as present damages. [*Parke, B.*—In *Clegg v. Dearden*(a), where the owner of a coal mine excavated wrongfully into his neighbour's mine, it was held, that the latter could not recover for damage occasioned by the flow of water in consequence of the aperture remaining unclosed, an action having already been brought for making the aperture and letting in the water, and the plaintiff having, on reference to arbitration, had damages awarded and paid to him for such injury; although the damage last complained of was subsequent to such award and payment.] That case

(a) 12 Q. B. 576.

may be distinguished on the ground that there the defendant had trespassed on the plaintiff's soil; here, it appears, that the strata of minerals under the plaintiffs' land do not belong to them. It is clear, that, in order to constitute a cause of action, there must be a wrong as well as an injury. In *Hodsoll v. Stallebrass* (a), where, in an action for wounding the plaintiff's servant, it was held, that damages might be given in respect of future disability, *Littledale, J.*, said, "It is argued, that a fresh action might be brought from time to time; but that is not so, the action being founded, not on the damage only, but upon the unlawful act and the damage." *Fetter v. Beale* (b) is also an authority, that, in this case, no new right of action accrued from the subsequent damage. In the cases which appear to militate against this view, it will be found that the ground of action was the consequential damage, and not the injury to a right. In *Roberts v. Read* (c), a surveyor of highways, in execution of his office, undermined a wall adjoining the highway, which did not fall till more than three months afterwards; and it was held that he was liable to an action, though the Highway Act directed that all actions against any persons for anything *done* or *acted* in pursuance thereof should be commenced within three months after the fact committed. Lord *Ellenborough, C. J.*, there says, "It is sufficient that the action was brought within three months after the wall fell, for that is the gravamen: the consequential damage is the cause of action in this case. If this had been trespass, the action must have been brought within three months after the act of trespass complained of; but, being an action on the case for the consequential damage, it could not have been brought till the specific wrong had been suffered; and that only happened within three months before the action brought." In *Sutton v. Clarke* (d), *Gibbs, C. J.*, observed, that

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(a) 11 A. & E. 301.

(b) 1 Salk. 11.

(c) 16 East, 215.

(d) 6 Taunt. 29; 1 Marsh. 429.

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" *Roberts v. Read* let the plaintiff loose from the very great difficulty imposed by the words (which it might be very absurd and unjust) of making the act done, and as in the statute 21 Jac. 2, c. 16, the cause of action, the criterion of the time ;" but at the same time his Lordship expressed some disapprobation of that decision (a). In *Gill v. Boddington* (b), a dock company had, two years before the commencement of the action, undermined the wall of wharf in which the plaintiff's father then had a life interest with remainder to the plaintiff. In consequence of the undermining, the wall fell, but after the plaintiff's title accrued; and it was held, that, as the action was brought within six months after the falling of the wall, the plaintiff might maintain it, although the dock company's Act provided that no action should be commenced against any person for anything done in pursuance of that Act after six calendar months next after the fact committed. There, however, the plaintiff declared for an injury to his estate in possession, by reason of the defendant permitting the wall to remain undermined; and it did not appear that he had any ground of complaint in consequence of the undermining itself. But where a surveyor of highways separated a portion of the plaintiff's close from the residue, by building a wall, which was begun more than three months before the action brought, and, though at that time very low, formed a complete division between the parcels, it was held, that the plaintiff could not maintain an action in respect of the raising of the wall after the expiration of the three months since before that time there was a complete separation, as the raising of the wall was not such a new act of severance as to take the case out of the limitation in the Highways Act, 13 Geo. 3, c. 78, s. 81: *Wordsworth v. Harley* (c). Again, where a canal company entered upon the plaintiff's land and dug it away for the purpose of sloping the bank

(a) 6 Taunt. 40, n. (b) R. & Moo. 161. (c) 1 B. & Ad. 391

of their canal, in consequence of which it was from thenceforth at every high tide covered with water, it was held that the injury was complete when the land was taken, and that the flowing of the tide over did not constitute a new cause of action: *Lord Oakley v. The Kensington Canal Company* (a). Where the act itself is an interference with a right, a cause of action accrues whether there be actual damage or not; but where the injury arises solely from the consequential damage, it is that which constitutes the cause of action. If there be an injury to a right, it is immaterial that the damage was unknown. The statute of limitations begins to run from the time of the accrual of the cause of action, not of the discovery of the damage: *Howell v. Young* (b). This is not like the case of a nuisance, the continuance of which creates a fresh cause of action de die in diem: *Thompson v. Gibson* (c), *Homes v. Wilson* (d). It must be presumed that the arbitrators have certified in respect of prospective as well as present damage.

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Gray contra.—Where the owner of land is entitled to support from the adjoining soil, no action will lie unless there is a damage as well as an injury to his right. Here the damage constituted the cause of action, and a new right of action accrued upon each succeeding damage. It cannot be said that the plaintiffs were entitled to have their land supported by any particular block of coal. Suppose the defendant had removed the coal and substituted props, would that give any cause of action? [*Alderson, B.*—Or, suppose a person was entitled to have his house supported by his neighbour's props, and the latter removed them, but, before any damage was done, he restored the props.] That would afford no ground of action. *Roberts v. Read* (e)

(a) 5 B. & Ad. 138.

(b) 5 B. & C. 259; and see *The Imperial Gas Light Company v. The London Gas Light and Coke*

Company, ante, p. 39.

(c) 7 M. & W. 456.

(d) 10 A. & E. 503.

(e) 16 East, 215.

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is an authority in point. There the plaintiff must have had a right to the support of, or some easement in, the adjoining soil, and that right was interfered with when the soil was removed so as to expose the foundation of her wall to the rain and frost; and yet it was held, that the cause of action was the consequential damage arising from the falling of the wall. Again, in *Gillon v. Boddington* (a), the defendants, by undermining the wall, deprived the plaintiff of his right of support; and yet it was held, that the falling of the wall constituted the cause of action. This case is not distinguishable from that of a nuisance. If a person has a right of way over the close of another, and the latter obstructs it by digging a hole, that is a nuisance, and every continuance of it gives a fresh cause of action. So here, a new right of action accrues to the plaintiff as long as his land continues without support. [*Parke, B.*—In *Clegg v. Dearden* (b), Lord Denman, C. J., points out the distinction between the legal obligation to discontinue a trespass or remove a nuisance on a person's own land and on the land of another.] A person is liable for continuing a nuisance on the land of another, although he has no right to enter and remove it: *Thompson v. Gibson* (c), 2 Wms. Saund. 171 d, note (f). In slander, the cause of action is the speaking of the defamatory words, but the statute of limitations does not begin to run until some damage has been sustained: *Littleboy v. Wright* (d). [*Alderson, B.*—There the real cause of action is the damage sustained in consequence of defamatory words previously spoken, and therefore the limitation runs from the time of the damage.] In *Ashby v. White* (e), the plaintiff had a right to vote at an election for members of Parliament, and when he was deprived of that right there was a complete cause of action, though no actual damage. [*Parke,*

(a) R. & Moo. 161.

(b) 12 Q. B. 576.

(c) 7 M. & W. 456.

(d) 1 Lev. 69.

(e) 2 Ld. Raym. 938.

R.—Wherever an act done would be evidence against the existence of a right, that is an injury to the right, and the party injured may bring an action in respect of it.]

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Phipson, in reply, cited *Marzetti v. Williams* (a).

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. (after stating the pleadings)—It was not disputed that the agreement mentioned in the plea and its performance were an answer to the then existing cause of action, and the only question is, what was in this case that cause of action? Was it the actual damage to the plaintiffs' land and house, &c., or the injury to the plaintiffs' right to have their land and house, &c., supported by the land near it and the strata of coal, &c., under and near it, so that when any part of the stratum which was necessary to the support of the land and house was withdrawn, there was a cause of action, though no actual damage was done? For every injury to a right imports a damage, as laid down in the case of *Ashby v. White*, by Lord Holt (b), and adopted and recognised in several other cases referred to in *Webb v. The Portland Manufactory Company* (c), and *Embrey v. Owen* (d).

We think this action is for an injury to a right; and, consequently, there was a complete cause of action when the wrong was done, and not a new cause of action when damage was sustained by reason of the original wrong. When so much of the land coal or substratum was taken away as to deprive the plaintiffs' land and house, &c., of the support to which the plaintiffs were entitled, a cause of action accrued, though no actual damage occurred by the sinking of the land or falling of the house, or any

(a) 1 B. & Ad. 415.

(b) 2 Ld. Raym. 938.

(c) 3 Sumner, Amer. Rep. 197.

(d) 6 Exch. 353.

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part of it, or even by part of the structure being cracked or displaced; although it would not be easy to prove that an essential part of the support was withdrawn, unless some actual effect upon the land or structure was produced. For this wrong the plaintiffs would have a right to recover a full compensation, including the probable damage to the fabric; and if they had already obtained a verdict with damages, they must be presumed to be satisfied for all the consequences of the wrong; and if, instead of having a verdict, they receive with their own consent a satisfaction, such satisfaction is to be considered to compensate for all the consequences of the wrong.

It remains to consider some cases cited and much relied upon on the argument before us, shewing that the limitation of actions under particular statutes, directed to be brought within a certain time "from the fact committed," dated from the period when the consequential damage was occasioned; and, therefore, it was said that the damage was the cause of action. Those statutes mean, no doubt, the limitation to run from *the act*, that is, the cause of action. But, on examining those cases, they do not appear to be for injuries to *rights*, which this is, but solely for *consequential damages* where the original act itself was no wrong, and only became so by reason of those damages, and therefore they do not apply. Thus, the case of *Roberts v. Read* (a), the first quoted, seems not to have been an action for depriving the plaintiffs' wall of the support of

and damaging the wall, and washing away the materials. The report says the wall was *undermined* by the company deepening the dock; but the context, we think, explains that the word is not to be understood to mean that it was deprived of the support to which the plaintiff had a right; but the cause of action was the making of an excavation, the consequence of which was, that the water of the river washed away the soil from under the wall. The case of *Sutton v. Clarke* (a) also was a case of a consequential damage, not of injury to a right.

We think that the defendant is entitled to our judgment.

Judgment for the defendant.

(a) 6 Taunt. 29; 1 Marsh. 429.

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REPLEVIN of the plaintiff's goods.

Second avowry (b), that Walter Trevelyan (the father of the

W. T., by will made in 1818, devised to his son R. T. an

annuity or rent-charge of 300*l.*, issuing out of certain land, for his life, payable quarterly; and, by a codicil of even date, he declared, that, in case his son should marry, it should be lawful for him, if he should think proper, to settle an annuity of 300*l.* upon the woman he might happen to marry for her life by way of jointure, to be charged upon the said real estate in like manner as the annuity or rent-charge of 300*l.* devised to his son: and that, in case his said son should so settle an annuity, it should be by way of substitution for the annuity given to him by the will; and that, immediately on such substitution and settlement of the said annuity, the annuity given by the will should cease. After the testator's death, R. T. married, and, in exercise of the power given by the will, by a deed-poll settled and appointed an annuity of 300*l.* a year, by way of jointure, on his wife, declaring the same to be charged on the testator's estate, in like manner as the former annuity was charged by the will:—*Held*, that the terms "by way of jointure," in the codicil, did not postpone the wife's annuity till after her husband's death, the testator's intention being to give the husband the power to settle an annuity in lieu of that given to him by the will, and to take effect immediately; and consequently, on the execution of the deed-poll, the wife took the substituted annuity.

The doctrine of ademption is of a purely equitable character, and does not prevail in a Court of law.

(a) Decided in the preceding Term.

(b) There was a demurrer to the first avowry, on the argu-

ment of which judgment was given for the plaintiff. The case, however, did not afford sufficient ground for a report.

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defendant Raleigh Trevelyan, before the time when &c., was seised of the said premises in which &c., and before the time when &c., to wit, on the 13th May, 1818, by his will devised to the said R. Trevelyan an annuity or yearly rent charge of 300*l.* during the term of his natural life, issuing out of the said premises, payable on the usual quarter days, with a power of distress, and that, by a codicil to the will, bearing even date therewith, the testator, being so seised as aforesaid, declared as follows (a): "I likewise declare my will and mind further to be, that, in case my said son R. Trevelyan shall marry, it shall be lawful for him, if he thinks proper, to settle an annuity of 300*l.* per annum upon the woman he may happen to marry, for her life, *by way of jointure*; and which annuity shall be charged upon my said real estate in like manner as the annuity or yearly sum of 300*l.* by my said will devised to or in trust for my said son Raleigh is by my said will charged thereon; and in case my said son R. Trevelyan shall so settle an annuity or yearly rent-charge or sum on any wife he may happen to marry, it shall be by way of substitution for the said annuity or yearly rent-charge so given and devised to or in trust for my same son by my said will; and that, immediately on such substitution and settlement of the said annuity or rent-charge of 300*l.* by my said son Raleigh on the woman he may happen to marry, the said annuity or yearly rent-charge of 300*l.* by my said will given and devised to or in trust for my said last-mentioned son shall cease, determine, and be wholly extinguished." —The avowry then proceeded to allege, that afterwards, to wit, on the 10th of June, 1819, the testator died so seised of the said premises in which &c., without altering his will or codicil; and that afterwards, on the 20th of June, 1819, the defendant Raleigh intermarried with the defendant

(a) That portion of the codicil in the plea is here inserted verbatim, to avoid repetition.

Elizabeth; and that, from the time of the death of the testator, the said annuity or yearly rent-charge had been always duly paid up to a certain day before the making of the deed poll hereinafter mentioned; and that, on the 17th of February, 1851, the defendant Raleigh Trevelyan, by a certain deed poll, appointed an annuity by way of jointure and in substitution of the annuity given by the will, and charged it on the premises on which &c.; and that the defendants distrained for the arrears of such annuity.

The plaintiff pleaded in bar to this avowry, first, that the said R. Trevelyan did not, by virtue and in exercise of the said power, settle and appoint the said annuity modo et forma; and, secondly, that the said Walter Trevelyan did not, by the said will and codicil, give and devise as in the said second avowry in that behalf alleged—Upon these pleas in bar issues were joined.

At the trial, before *Cresswell*, J., at the last Newcastle Assizes, it appeared that Walter Trevelyan, the testator, being seised in fee of certain lands, and, amongst others, of the premises upon which the distress was levied and of which the plaintiff was tenant, devised to his son Raleigh Trevelyan, the defendant, an annuity or rent-charge of 300*l.* during the term of his life, and issuing out of the lands upon which the distress was made, with a power to distrain on non-payment of such rent-charge or annuity. To this will, which was dated the 13th of May, 1818, the testator added a codicil of the same date. This will and codicil were given in evidence. The codicil contained a clause which is set forth in the second avowry. It was stated by the plaintiff's counsel, that the testator, shortly before his death, in anticipation of the marriage of his son, the defendant, with one Elizabeth Grey, the other defendant, by indentures of lease and release, bearing date respectively the 1st and 2nd of June, 1819, settled upon the defendant's wife for life the annual sum of 400*l.* in lieu of dower, and chargeable upon

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one of the testator's estates (a). It further appeared, that, on the 10th of June, the testator died; and that on the 24th of that month the defendants intermarried, long after the testator's death, namely, on the 17th of February, 1851, the defendant Raleigh Trevelyan, by deed poll, appointed an annuity to his wife by way of jointure, and in substitution of the annuity of 300*l.* given by the will, and charged it on the premises upon which the distress was made. This deed poll, after reciting the power, proceeded thus:— "Whereas the said W. Trevelyan died on or about the 10th June, 1819, and his said will and codicil were soon after proved by the executors therein named: And whereas the said R. Trevelyan, in the month of June, 1819, intermarried with Elizabeth Grey, daughter of Robert Grey, of Shemston, in the said county of Northumberland, Esquire, and she is still living, and is the wife of the said R. Trevelyan: Now know ye, and these presents witness, that I the said Raleigh Trevelyan, by virtue of my said recited power, and of every other power enabling me in this behalf, do by this deed settle and appoint an annuity of 300*l.* per annum upon my said wife Elizabeth Trevelyan *by way of jointure*; and I declare that the same shall be charged upon the real estate of the same testator, in like manner as the annuity or yearly sum of 300*l.* by the said will devised to or in trust for me is by the said will charged therein. In witness whereof" &c. This rent-charge had been duly paid from the time of the testator's death up to the 25th of December, 1850, when it was discontinued, and the distress, the subject of the present action, was levied to try the question as to the defendant's right to such annuity or rent-charge.

On the part of the plaintiff it was contended, first, that under the will and codicil, and the deed executed by the male defendant, his wife was not entitled to the annuity

(a) The effect of these instruments was considered in the case of *Trevelyan v. Trevelyan*, 3 Bing. 616.

until after the death of her husband; and, consequently, that the defendants had no right to distrain. It was further contended, that the deeds of the 1st and 2nd of June, 1819, would operate as an ademption of the annuity or rent-charge granted to the wife by virtue of the power given by the codicil. The defendants' counsel objected, that the deeds were not admissible in evidence under either of the issues raised by the pleas in bar to the second avowry. An application was then made on the plaintiff's behalf to the learned Judge for leave to amend the pleadings, by adding a plea in bar. This, however, the learned Judge refused to allow, on the ground that it appeared that the plaintiff had obtained leave to add the second plea in bar upon undertaking to admit on the trial of the cause the due execution of the will and codicil, and that the only question which such new plea would raise, would be one of construction upon the will and codicil. Under these circumstances, the learned Judge directed a verdict to be entered for the defendants upon both the issues raised by the pleas in bar to the avowry.

In last Easter Term, *Knowles* obtained a rule nisi to set aside the verdict, and for a new trial, with leave to the plaintiff to amend upon such terms as the Court might direct, or for judgment non obstante veredicto upon the second avowry.

Watson, Hugh Hill (*Willes* with them), shewed cause.—First, as to the amendment. There are several objections to this part of the rule. The doctrine of ademption is one of a purely equitable character. No authority can be cited to shew that it operates *at law*. This subject is fully treated of in 2 *Wms. Exors.*, 4th edit, page 1132 et seq. *Davys v. Boucher* (*a*), which is to be considered as a leading autho-

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rity upon the question, may also be cited to shew that this doctrine is not applicable to a devise of real estate. It was there held, that where a parent or person in loco parentis gives a legacy to a child by way of portion, and afterwards makes advances in the nature of a portion to that child, that will amount to an ademption of the gift by will, and a Court of Equity will presume he meant to satisfy the one by the other. But this doctrine applies only to legacies, and not to a bequest of a residue, or a devise of real estate; and to hold that the doctrine applies to devises of real estate would be to repeal the 6th section of the Statute of Frauds. It may be further observed, that no such external act as the disposal of property by deed without reference to the will itself, can operate as an ademption of the power under the will; and further, the subject matter alleged to be given in substitution of that first given by the will should be co-extensive with it: *Roome v. Roome*(a), *Rider v. Wager*(b), *Roper on Legacies*, 4th edit., page 329. The doctrine, therefore, of ademption is an equitable one; and in the present case it is extremely doubtful whether a Court of Equity would afford relief. [*Alderson, B.*, here intimated that it appeared to him upon reference to the authorities, that it was an equitable matter only. Upon which *Knowles* said that he would abandon this point, and would seek relief in equity.]

Secondly, as to judgment non obstante veredicto.—This question turns upon the meaning of the codicil. The plaintiff contends, that, by the words “by way of jointure,” the right of the wife to the annuity is postponed to the death of her husband. But this is neither the necessary nor the natural meaning of those words. A gift to a woman by way of “jointure” does not necessarily mean that she is to enjoy it in her husband’s lifetime. Strictly speaking the term “jointure” means for the joint lives of the husband and wife. Such a construction as that contended for

(a) 3 Atk. 183.

(b) 2 P. Wms. 329.

7 should not take effect before the death of the husband would have said so in explicit language. According to the construction of the term "jointure," to be found in Stat. 8, c. 10, s. 6, as put upon it by the Judges in the solution in *Vernon's case* (a), it must take effect at the death of the husband at all events; but there is no report which justifies the position that the annuity may be postponed to the time of the husband's death. *Case* (b), there cited, is an authority to the contrary. The father of an intended husband by feoffment, made on the marriage of his son, limited lands to the use of the intended wife for her life, for her jointure; and it was held that this was a jointure within the intent of the Act, notwithstanding Lord Coke observes, the estate was only to the wife for her life, whereas all the estates in the Act are of a joint tenancy, and all is of one effect." [Platt, B.—The definition of "jointure," to be found in Jacob's Law Dictionary, is "A gift of lands and tenements made to a woman in consideration of marriage; or, it is a covenant whereby the husband or some friend of his, assureth to the wife lands or tenements for term of her life. It is so called, either because it is granted ratione juncturæ in matrimonio, or forasmuch as in frank marriage was given jointly to husband and wife, and after to the heirs of their bodies, where husband and wife were made as it were joint tenants during the coverture." And for that definition

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a joint estate with her husband), is a competent livelihood of freehold for the wife of lands or tenements, &c., to take effect presently in possession or profit after the decease of her husband, for the life of the wife at the least, if she herself be not the cause of the determination or forfeiture of it." But this passage cannot be relied upon as an authority that the estate is not to take effect before the husband's death; for Lord Coke refers to *Vernon's case*, where the subject is treated "more at large." He is merely defining the least estate which will be a jointure within the statute of 27 Hen. 8. Now, by the will in question, the annuity to the husband was payable upon the usual quarter days; and the substituted annuity to the wife, which the husband was empowered by the codicil to settle upon her, is to be payable in the same manner. When the husband makes the appointment, the next quarterly payment becomes due in right of the wife. If this be not so, no effect is given to these words of the codicil. [*Alderson, B.*—I certainly cannot see any reason why the wife's annuity is not to take effect before her husband's death. How can it be said that the annuity which is to be in substitution of that which is to be for the life of the husband is not to take effect before an event which may postpone it for a very long period? The whole argument on the part of the plaintiff rests upon a very forced construction of the words "by way of jointure."] This is an attempt to give such a construction as is neither warranted by the intention of the testator, as expressed upon the face of the will and codicil, nor by any authority to be found in the books (a).—The Court then called on

Knowles, Raymond, and Quain, to support the rule for judgment non obstante veredicto.—The testator has not

(a) In *Hervey v. Hervey*, 1 Atk. 563, Lord Hardwicke says, "The words *jointure* or *provision* are synonymous terms."

given his son a power to settle the annuity upon his wife for her life merely, but it is to be by way of "jointure." According to the common acceptation of that term, the estate does not commence in the husband's lifetime. In 1 Bla. Com. by Stewart, p. 152, it is said: "A jointure, which, strictly speaking, signifies a joint estate limited to both husband and wife, but in common acceptation extends also to a sole estate limited to the wife only, is thus defined by Sir Edward Coke:—'a competent livelihood of freehold for the wife of lands and tenements, to take effect in profit or possession presently after the death of the husband for the life of the wife at least.' " This annuity to the wife being in bar of dower, affords an additional argument that it was intended that it should commence when the estate of which it is to be the representative commences. [Pollock, C. B.—That construction of the testator's intention is, to say the least of it, a highly improbable one—I may say, an impossible one. A person wishing to provide for his son, gives him an annuity of 300*l.*, with the power of settling it upon his wife, annexing a condition, that, in case he should make such appointment, the new annuity shall be in substitution of that given to the son, which annuity is wholly to cease and determine. It would be but a poor substitution for an annuity of which the son is in the present enjoyment, if the effect of the arrangement were to deprive him of his annuity. The question then is, whether, in the face of such an improbable construction, the word "*jointure*" necessarily means a provision for a woman after her husband's death.] If the word has not that meaning, the testator has expressed his intention in a singular manner. Bac. Abr. tit. "Dower and Jointure" (G,) affords an argument in favour of the plaintiff's construction. A provision for the wife during her husband's lifetime is usually called pin-money. If the testator had intended that the estate should be to the wife

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for life, he would not have added the words "by way of jointure." This is a power to charge the estate of a stranger; and if the will and codicil admit of two meanings, that construction ought to be adopted which is most favourable to the terre-tenants. The ordinary mode of providing for a woman by jointure is treated of in 1 Roper on Husband and Wife, by Bright, p. 448. The case of *Wykham v. Wykham* (a) may also be referred to. The power here given is a mere power to charge an estate in lieu of dower, according to the intention of the testator. [Alderson, B.—The term "jointure" may mean an estate to the wife, to commence either before or after the death of her husband. The testator gave his son an annuity, and something more; but, according to the plaintiff's argument, the son by the power given to him would have less. If the testator had given his son the power to appoint an estate to his wife of 500*l.* a year, payable to her on his death, in substitution of that which he had of 300*l.* a year payable in præsentî, the argument would be more plausible.]

POLLOCK, C. B.—I am of opinion, that the rule for judgment non obstante veredicto ought to be discharged. The point upon the amendment has been abandoned. The question then turns entirely upon the meaning of the clause in the codicil to the will of Raleigh Trevelyan's father. The substance of the will is as follows:—There is, first, an annuity granted to Raleigh absolutely for his life, of which he is to have the full benefit. It is charged on other lands than those of which he was to be possessed for life, namely upon certain lands that (it is said) went to some younger children. Now, he having that annuity of 300*l.* a year given to him for his own life and for his own

(a) 18 Ves. 395.

benefit, the testator by this codicil gave him the following power, contained in a clause which says, that, "in case Raleigh Trevelyan shall marry, it shall be lawful for him, if he think proper, to settle an annuity of 300*l.* per annum upon the woman he may happen to marry, for her life;" that is, he has the power of settling an annuity upon his wife for life. But then comes the expression "by way of jointure," which I take to mean, that the annuity shall be given, not as is suggested, according to the popular notion of a "jointure," as something from which she is to derive no benefit till her husband's death, but an annuity to take effect immediately. In other words, the codicil gives the power to settle an annuity on the wife *for her life*, though by way of jointure only, according to the provisions of the stat. of the 27 Hen. 8, c. 10. Therefore, if this annuity had been given to her before marriage, it would have been in bar of dower; but being after marriage, it left the wife the option of claiming her dower and of giving up the annuity, or of keeping the annuity and of giving up her dower. The will then says, that the annuity shall be charged upon the same premises as those upon which the other annuity is charged, "in like manner as the same annuity or yearly sum of 300*l.* by my said will devised to or in trust for my said son Raleigh Trevelyan is by my said will charged thereon; and that, in case my said son Raleigh Trevelyan shall so settle an annuity or yearly rent-charge on any wife he may happen to marry, it shall be by way of substitution for the said annuity or yearly rent-charge so given and devised to or in trust for my said son by my said will;" that is, there are not to be two annuities, but one only; "and that, immediately on such substitution and settlement of the said annuity and rent-charge of 300*l.* by my son Raleigh on the woman he may happen to marry," the other annuity shall cease. Certainly, the whole of this language has a present aspect, and does not

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look like a postponement of the annuity to the wife till her husband's death, the words being "the said annuity or yearly rent-charge of 300*l.* by my said will given and devised to or in trust for my said last-mentioned son shall cease, determine, and be wholly extinguished." It appears to me, that, reading these words, and looking at their grammatical meaning, and at what, in all probability, must have been intended by such expressions, their effect and meaning is this: "I give to you, Raleigh Trevelyan, for your own benefit, an annuity of 300*l.* a year for your life; but, if you happen to marry, you shall be at liberty to settle it on your wife for her life, to begin immediately; and, instead of your receiving it then, it will be for her benefit. She will, indeed, be entitled to it; but you, as her husband, will of course enjoy it during her life; and this is to be done by way of jointure, that is, it is to be in bar of dower. This is not simply an annuity, but it is an annuity which she is to have for her life, commencing immediately; and in case of your death, if she survives you, she is then to have it in bar of dower." The testator may possibly have meant (though that question does not arise now), that the husband should have power to settle it on her by way of jointure during their lives. It is by no means clear, that the annuity is to be for her life only. I think it would be far more reasonable to contend, that this settlement upon her by way of jointure was for the lives of both. However, that question does not arise. With reference to the question now before us, I entertain no doubt, that the testator intended that the annuity should be enjoyed by the wife during the whole of her life, and, in the event of her surviving her husband, that she should receive it by way of jointure and in bar of dower.

ALDERSON, B.—I am of the same opinion. The annuity is expressly granted to the wife for life. But, according to

the argument for the plaintiff, it would not be to her for her life, but to her after the death of her husband for the remainder of her life. Then, do the words "by way of jointure" warrant such a construction? I think not, for those words would not shew that such an annuity was not to take effect in the lifetime of the wife, but only that it was to be taken in substitution of dower. It is a perfectly good jointure, under the provisions of the statute, if we hold, that the wife takes it for the whole of her life, beginning from that time when the deed-poll is executed. Moreover, it seems to me, that this is a reasonable construction of the will, and the only reasonable construction of it, for the purpose of giving effect to the words "for her life." But then let us see what the other parts of the case are, for in my opinion they confirm this view very clearly. The testator gives to his son an annuity for his son's life, and gives him a power, which is obviously intended to be an additional benefit to him, of substituting his wife's life, in case he should choose to do so. Surely, it would be no additional benefit to the son, if the substitution of the wife's life in place of his own was only to be on condition, that, during the remainder of his own life, his own annuity should cease. I cannot think that to have been the intention of the testator. The words are "for life," and full effect cannot be given to those words unless the annuity begins immediately. If the annuity begins immediately, full effect is also given to the words "by way of jointure." Therefore, by this construction, effect is given to every word, and, in my opinion, also to the intention of the testator, and which the argument on the other side does not do. In this case, therefore, the annuity was for the wife's life, beginning at the time the instrument was executed, and not at the time of the husband's death, when there could be no substitution of the one annuity for the other, seeing that the thing for which it was to be substituted must have ceased.

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PLATT, B.—I concur with the opinions which have been expressed by my learned Brothers, and also in the reasons which they have assigned. It may be further remarked, that, if the argument on the part of the plaintiff is to prevail, the words pointed at in the codicil would be entirely got rid of, because the annuity is most clearly given to the wife for life. A power is given of settling it on the wife for her life, and if she were not to live as long as her husband, she never would have it at all. That would be a direct negative of the power that is given to the husband of settling it during the whole of her life. The words “by way of jointure” do not appear to me to alter the case, because it is consistent with those words that she might enjoy it during her own life, if she survived her husband, and also during their joint lives (a).

Rule discharged.

(a) *Martin*, B., had left the Court before the conclusion of the argument.

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PAYNE and Another v. THE NEW SOUTH WALES COAL AND INTERCOLONIAL STEAM NAVIGATION COMPANY. *June 27.*

THE first count of the declaration stated, that, before the provisional registration of the company and the making of the articles of agreement thereafter mentioned, the plaintiffs had started the project of forming a joint stock company in England for purposes within the meaning of the 7 & 8 Vict. c. 110, to be called "The Australian Coal Mining and Screw Steam Coasting Navigation Company," the capital of which company should be divided into shares, and so as to be transferred without the express consent of all the copartners in the proposed company, and the members of which company should consist of more than twenty-five persons; and the plaintiffs, before the provisional re-

The first count of a declaration stated, that the plaintiffs had projected a joint stock company within the meaning of the 7 & 8 Vict. c. 110, which company was afterwards provisionally registered: that, within twelve months after its provisional registration, articles of agree-

ment were entered into between the plaintiffs of the one part, and P. and L. of the other part, whereby the plaintiffs agreed to transfer to P. and L. on behalf of the company all the interest of the plaintiffs therein; and P. and L. on behalf of the company agreed that, in case the plaintiffs should, within six calendar months after the arrival of the first of the steam vessels to be dispatched by the company in the colony of Australia, commence the business of shipbrokers at Sydney, the plaintiffs should be the shipbrokers of the company for the port of Sydney; and further, that the company should provide the plaintiffs with a free passage to the said colony by the first of the company's steam vessels so to be dispatched. Averments, that afterwards the company was completely registered; that, after the provisional registration of the company, the first steam vessel was despatched by the company to Australia, and the plaintiffs were willing to have gone by it, and did all things necessary to entitle them to the agreed passage. Breach, that the company refused to permit the plaintiffs to go by that vessel. Second count, that the company, after their complete registration, by their directors, exonerated and discharged the plaintiffs from establishing the business of shipbrokers at Sydney within six calendar months after the arrival of the first steam vessel; and the company then agreed with the plaintiffs, that the time for establishing such business at Sydney by the plaintiffs should be enlarged; and that, if the plaintiffs established such business at Sydney within six calendar months after the arrival of a certain other steam vessel which the company agreed to dispatch to Australia, the plaintiffs should have and transact the company's ship-broking business at the port of Sydney, upon the terms in the articles of agreement mentioned; and the company also agreed with the plaintiffs to provide them with a free passage to the said colony. Averments, that the plaintiffs have always been ready and willing to proceed to the said colony by the last-mentioned steam vessel, and have done all things necessary to entitle them to the agreed passage. Breaches, that the company after their complete registration have refused to establish any ship-broking business at Sydney, and have refused to dispatch the last-mentioned steam vessel. On demurrer:—*Held*, that the first count was bad, since the completely registered company was not liable on the contract made by the provisionally registered company.

Held, also, by *Platt, B.*, and *Martin, B.*, that the second count was bad, since it did not disclose any consideration for the alleged agreement. *Parker, B.*, dubitante.

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gistration of the company, and before and at the time of the making of the said agreement, had expended a considerable amount of money, labour, and time in endeavouring to mature their said project and form the said company, and the said company was in the course of formation, and about being established by the plaintiffs as the projectors and promoters thereof; that, just before the provisional registration of the proposed company, the plaintiffs had agreed with F. Pegler and B. Lloyd, that the plaintiffs should, and they did transfer and relinquish their said project, and all their interest therein as projectors thereof, to F. Pegler and B. Lloyd, on behalf of the said intended company to be thereafter formed; and that the name of such intended company should be changed and called "The Australian Coal and Intercolonial Steam Navigation Company."—The declaration then stated, that afterwards, and before the making of the articles of agreement, F. Pegler and B. Lloyd, as the promoters of the proposed company, made a return, to the office for the registration of joint stock companies, of the particulars according to the Schedule C. to the said Act annexed; and that thereupon the said return was registered by the registrar of joint stock companies, who gave a certificate of the provisional registration of the company by the name last aforesaid. That, within twelve months from the date of such certificate, articles of agreement were entered into between the plaintiffs of the one part, and F. Pegler and B. Lloyd, therein described as two of the provisional directors of the Australian Coal and Intercolonial Steam Navigation Company, on the behalf of the said company, of the other part; whereby the plaintiffs agreed to transfer and relinquish unto F. Pegler and B. Lloyd, on behalf of the said company, the project for the formation of the company, and all the right and interest of the plaintiffs therein. And by the said articles of agreement F. Pegler and B. Lloyd, on behalf of the said company, did further agree, that, in case the plaintiffs should, within six calendar

months after the arrival of the first of the steam vessels to be dispatched by the company in the colony of Australia, commence the business of shipbrokers at Sydney, the plaintiffs should be shipbrokers to the company for the port of Sydney. And, further, that the company should provide the plaintiffs with a free first-class cabin passage to the said colony by the first of the company's steam vessels so to be dispatched as aforesaid: Provided, that nothing in the articles of agreement contained should be taken otherwise than as conditional upon the company obtaining their certificate of complete registration; and that F. Pegler and B. Lloyd should not incur personal responsibility or liability of any kind in respect to those articles of agreement, but that the plaintiffs should resort to the company.—The declaration then proceeded to state, that F. Pegler and B. Lloyd as such promoters of the intended company, registered the further particulars required by the Act to be provisionally registered; that the company was duly formed by deed under the hands and seals of the shareholders; and that afterwards, and within twelve months from the certificate of provisional registration, the said deed was registered, and thereupon the registrar of joint stock companies granted a certificate of complete registration of the company.—Averments: That, after the provisional registration of the company, a steam vessel belonging to the company, called the "William Wiskin," having cabins for passengers, was dispatched by the directors from the port of London to the colony of Australia, and which steam vessel, being the first dispatched by the company to Australia, afterwards arrived in the colony; and the plaintiffs were ready and willing to have gone in that vessel as passengers to Australia, and done all things necessary to entitle them to have the agreed passage to that colony by the steam vessel. Breach: that the company and their directors would not provide the plaintiffs with a free first-class or any passage, and refused to permit the plaintiffs to go by that vessel to the colony of Australia.

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lia. Second count: And the plaintiffs further say, that the company, after their complete registration, by their then directors exonerated and discharged the plaintiffs from establishing the business of shipbrokers at Sydney within six calendar months after the arrival of the steam vessel called the "William Wiskin;" and *the company then agreed with the plaintiffs* that the time for establishing such business at Sydney by the plaintiffs should be enlarged; and that, if the plaintiffs established such business at Sydney within six calendar months after the arrival of a certain other steam vessel of the company, called the "Golden Queen," which the company by their directors proposed to and agreed with the plaintiffs to dispatch to the said colony of Australia, the plaintiffs should have and transact the company's ship brokering business at the port of Sydney upon the terms in the articles of agreement mentioned; and the company, by their directors, then also agreed with the plaintiffs that they the company would provide the plaintiffs with a free first-class cabin passage to the said colony by the company's steam vessel called the "Golden Queen."—Averments: That the plaintiffs have always been ready and willing to proceed to the said colony by the steam vessel called the "Golden Queen," and have done all things necessary to entitle them to have the agreed passage to the said colony by that steam vessel, and to have had and transacted the ship-broking business of the company at the port of Sydney. Breaches: That the company and their directors, since the complete registration, have refused to establish any ship-broking business at the port of Sydney; and have refused to dispatch the steam vessel called the "Golden Queen" to the colony of Australia.

Demurrer to both counts, and joinders therein.

Lush (*Bramwell* with him) in support of the demurrers.—The question raised by the demurrer to the first count is, whether a joint stock company completely registered

under the provisions of the 7 & 8 Vict. c. 110, is liable on contracts made after provisional and before complete registration. It is submitted that it is not. A company, on provisional registration, cannot enter into contracts for any service except such as is necessarily required for the establishment of the company, and except any contract to be made conditional on the completion of the company, and to take effect after complete registration: sect. 23. By the 25th section, a completely registered company may adopt any contract made by the shareholders or other persons with a trustee on behalf of the company before complete registration, and may enforce the same in all respects as if it had been made with the company after their incorporation; but there is no corresponding power to sue the company on such contracts. [*Martin, B.*, referred to the 44th section.] *Hutchison v. The Surrey Consumers Gas Light Association* (a) decided that a company completely registered is not liable on contracts made by the promoters before provisional registration.—The second count is also bad, inasmuch as it does not disclose any consideration whatever for the alleged agreement.

Bovill contra.—First, a completely registered company is liable in respect of contracts made after provisional and before complete registration. The general policy of the Act favours that view. *Hutchison v. The Surrey Consumers Gas Light Association* has no bearing on this case; for before provisional registration the company has no existence, and its members are mere promoters. The 25th section only relates to contracts made with a trustee on behalf of the company. The Legislature must have intended that the completely registered company should be liable; for it has enabled it, when provisionally registered, to make contracts which become effectual on complete registration. This

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(a) 11 C. B. 689.

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very point was before the Court in the case of *Taylor v. The Crowland Gas Company* (a). [*Martin, B.*—In that

(a) The following is the case referred to :—

The first count of the declaration stated, that the plaintiff sued for money payable by "The Crowland Gas and Coke Company" to the plaintiff, for the wages and salary of the plaintiff, for services by him done and performed as the secretary, and at the request of the Crowland Gas and Coke Company. The defendants pleaded (inter alia) never indebted, and also a plea which was demurred to*.

At the trial, before *Pollock, C. B.*, at the Middlesex Sittings after last Hilary Term, it appeared that the action was brought to recover a balance claimed by the plaintiff for salary as secretary of the Crowland Gas and Coke Company. The company was provisionally registered on the 1st of January, 1853. On the 5th, by a resolution of the Board of Directors, the plaintiff was appointed secretary of the company up to the time of its complete registration. He accordingly acted as secretary until the 25th of August, 1853, when the company was completely registered, and he also performed some services for the company after its complete registration. It was objected, on behalf of the defendants, that the completely registered company was not liable on the contract made with the plaintiff by the provisionally registered company. The learned Judge reserved the point, and left it to the jury to say how much was due to the plaintiff before, and how much after, complete registration; and they found a verdict for the plaintiff, with 21*l.* damages, before complete registration, and 1*l.* 1*s.* damages after complete registration.

Watson, in the following Term, obtained a rule nisi to reduce the damages to 1*l.* 1*s.*; against which

Montagu Chambers and *T. Tapping* shewed cause.—The 23rd section of the 7 & 8 Vict. c. 110, enables a provisionally registered company to contract for any services necessarily required for establishing the company; and it is not disputed that the service in respect of which the plaintiff claims is of that description. Then by the 25th section, the company may, on complete registration, sue and be sued by their registered name in respect of any claim by or upon them. The effect of those enactments is to render the completely registered company liable on necessary contracts made by the provisionally registered company. Although the parties to the

* See the case, post, p. 293.

case there was no decision; it stood over until after the demurrer was argued.]—He also referred to *Bull v. Chapman* (a).

(a) 8 Exch. 444.

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contract may be personally liable, the company is nevertheless bound. In *Barton v. Hutchinson**, which was an action against a shareholder on a contract made before complete registration, *Maule, J.*, ruled that the company might sue by their public officer upon contracts entered into before complete registration, and if so, there is no reason why they may not be sued. [*Alderson, B.*—There the contract was one which the provisional directors had no power to make, so as to bind any one but themselves.] *Hutchison v. The Surrey Consumers Gas Light Association*† only decided that a completely registered company was not liable on contracts made by the promoters before provisional registration.—They also referred to *Tard v. Hutton*‡.

Digby Seymour in support of the rule.—A provisionally registered company is only authorised by the 22nd section to enter into certain contracts, and in respect of those the promoters are liable. By the 25th section, the power to sue and be sued is given to the incorporated company, but before complete registration the company has no legal existence. *Barton v. Hutchinson* may be supported on the ground that the 25th section empowers the incorporated company to sue on contracts entered into by the provisionally registered company; but there is no corresponding enactment enabling them to be sued on such contracts. [*Alderson, B.*—The provisionally registered company may make contracts “conditional on the completion of the company, and to take effect after the certificate of complete registration.” Then, if the completely registered company is not liable on such contracts, what is the use of making them? The provisionally registered company may also make contracts necessarily required for the establishing of the company, and it is certainly reasonable that the company when established, and for whose benefit these contracts were made, should be liable in respect of them. It would seem to be a parliamentary mode of making one body responsible for the contracts of another—certainly no Act of Parliament was required to make them responsible for their own contracts. It is quite clear that the incorporated company may sue on

* 2 C. & K. 712. † 11 C. B. 689. ‡ Dom. Proc. 16 March, 1854.

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The second count shews a valid contract with the company after complete registration. [*Martin*, B.—Where is the consideration for it?] There is the mutual agreement of both parties. The defendants agree to employ the plaintiff in consideration that he will serve them. [*Parke*, B.—This subject underwent great consideration in the case of *Emmens v. Elderton* (a), where I pointed out that the term “it was agreed” makes the words of the agreement those of both parties.] If A. “agrees” with B., that is a mutual agreement between the two parties: *Wood v. The Copper Miners Company* (b). [*Martin*, B.—The word “agreed” may mean an agreement between the two parties, or it may express something to be done by the one only.] Upon general demurrer the Court will make every intendment in support of the count.

Bramwell in reply (c).—The word “agree” is equivalent to “promise.” There is no obligation on the part of the plaintiffs to act as the shipbrokers of the defendants. [*Parke*, B.—If the words had been “it was agreed by and between the plaintiffs and the defendants,” that would have imported an obligation on the part of the plaintiffs

(a) 13 C. B. 495.

(b) 7 C. B. 906.

(c) He was requested by the

Court to confine his argument to the second point.

beneficial contracts made for them by the provisionally registered company, and since they have the benefit they ought to bear the burden.]

The LORD CHIEF BARON then expressed himself dissatisfied with the amount of the damages, and suggested that they should be reduced by consent: and it was finally arranged that the case should stand over until after the argument of the demurrer; and that, if it was decided in favour of the plaintiff, the verdict was to stand; if not, the damages to be reduced to 7*l*.

Rule accordingly.

to act as the shipbrokers of the defendants.] Here there is no mutuality, but only a promise by the one party.

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PARKE, B.—I am of opinion that the first count is bad. It is impossible to make this company liable for acts done before its complete registration, unless by act of Parliament; and there is certainly nothing in the 7 & 8 Vict. c. 110 which renders them liable on a contract of this description.—With regard to the second count, my learned Brothers are of opinion that no consideration is stated in it. I entertain some doubt whether it is not good. If the word “agreed” is to be read as the agreement of both parties, then it imports that the defendants agreed to employ the plaintiffs, in consideration that they would serve the defendants: but, if the word “agreed” is to be read as in the case of *Sykes v. Dixon* (a), not saying with any body, then it is perfectly clear that no consideration is expressed.

PLATT, B.—The first count is bad. It does not appear that the contract was of any benefit to the company; and I am clearly of opinion that it was beyond the power of the provisionally registered company to bind the completely registered company by entering into it.—Then, as to the second count, it merely alleges that the defendants promised the plaintiffs to do something, and there is nothing whatever to be done on their part. Then where is the consideration? It is the same as if the count had stated that the defendants agreed to pay the plaintiffs 100*l*.

MARTIN, B.—I am of the same opinion as my Brother Platt on both points. With respect to the first, this was a contract by the promoters of the company after provisional and before complete registration; and it is clearly not a contract which the completely registered company is bound

(a) 9 A. & E. 693.

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to perform. The 23rd section of the Act authorises the promoters of a company to obtain a certificate of provisional registration, and upon that being done it becomes lawful for them to do certain things which are specified. But, so far from being enabled to bind the completely registered company by this contract, they can make very few contracts to bind themselves.—With respect to the second count, I am of opinion that it is bad in substance. The count states that it was part of the bargain between Pegler, Lloyd, and the plaintiffs, that in case the plaintiffs should, within six months after the arrival in Australia of the first steam vessel to be despatched by the company, commence the business of shipbrokers, the plaintiffs should be shipbrokers to the company; and further, that the company should provide the plaintiffs with a free passage to the colony by the first of the company's steam vessels. That was a one-sided bargain, and wholly for the benefit of the plaintiffs; for, although there was a promise on the part of the company to employ them, there was no obligation on their part to act. Then what takes place afterwards is this: the plaintiffs did not proceed to Australia by the first steam vessel despatched by the company, and therefore the latter were not bound to perform their part of the contract, assuming there to be one. Then it is alleged that the company, *after their complete registration*, exonerated and discharged the plaintiffs from establishing the business of shipbrokers at Sydney within six months after the arrival of the first steam vessel, and *agreed* with the plaintiffs, that, if they established such business within six months after the arrival of another steam vessel, they should be the company's shipbrokers. The word "agreed" is very inaccurately used. Undoubtedly, it may mean that it was agreed between the two parties; but it may also mean, that, notwithstanding the plaintiffs did not proceed to Australia by the first steam vessel, and therefore could not establish the business of shipbrokers within six months after its arrival, the defend-

ants agreed that the plaintiffs should transact their business upon the same terms, if the plaintiffs established the business of shipbrokers within six months after the arrival of another vessel. It seems to me, that it is nothing more than saying, "if you go out in the next ship, we agree or promise to employ you, and to give you a free passage." To support such a promise there must be a new consideration moving from the plaintiffs. For these reasons I think that the count is defective in substance.

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Judgment for the defendants(a).

(a) *Alderson*, B., left the Court in the course of the argument.

TAYLOR v. THE CROWLAND GAS AND COKE COMPANY.

June 16.

ACTION for work and materials.

Plea,—That the work and materials were done and provided in and about, and for the purpose of, the plaintiff's directly and indirectly drawing and preparing conveyances and deeds relating to real and personal estate, and proceedings at law and in equity, for and in expectation of fee, gain, and reward, and the money claimed for such work and materials is such fee, gain, and reward, contrary to the form of the statute in such case made in the 44 Geo. 3, c. 98; he the plaintiff not being a serjeant-at-law, barrister, solicitor, attorney, notary, proctor, agent, or procurator, having obtained a regular certificate, nor a special pleader, draftsman in equity, or conveyancer, being a member of one of the four inns of Court, and having taken out the certificate in that behalf required, and not being a person solely employed to ingross any deed, instrument, or other proceeding not drawn or prepared by himself and for his own account respectively, and not being a public officer drawing or preparing any official instrument applicable to his office and in the course of his duty, and

The 44 Geo. 3, c. 98, s. 14, which imposes a penalty on any unqualified person who acts as a conveyancer, is a prohibitory Act; and therefore such person cannot recover for conveyances drawn by him.

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none of the said conveyances, deeds, and proceedings being a will or other testamentary paper, or an agreement not under seal, or a letter of attorney.

Demurrer, and joinder therein.

Tapping in support of the demurrer.—The question depends on the construction of the 14th section (a) of the 44 Geo. 3, c. 98. The principle laid down in *Cope v. Rowlands* (b), is, that where a statute prohibits a contract, it is void, though the statute inflicts a penalty only; but where the act itself is not interdicted, but a penalty is imposed for the purpose of securing the revenue, the contract may be enforced, though the party is subject to the penalty. This enactment does not, either expressly or by implication, render the contract void. The title and preamble of the statute shew that it was passed for a financial purpose, and not for the protection of the public against unqualified practitioners. In *Edgar v. Hunter* (c), which was an action by a medical

(a) Enacts, "That every person who shall, for or in expectation of any fee, gain, or reward, directly or indirectly, draw or prepare any conveyance of, or deed relating to, any real or personal estate, or any proceedings in law or equity, other than and except serjeants at law, barristers, solicitors, attornies, notaries, proctors, agents, or procurators, having obtained regular certificates, and special pleaders, draftsmen in equity, and conveyancers, being members of one of the four Inns of Court, and having taken out the certificates mentioned in the said Schedule to this Act annexed, at the head office in London of the commissioners for managing the duties on stamped vellum, parchment, and paper, and other than and except persons solely em-

ployed to engross any deed, instrument, or other proceeding not drawn or prepared by themselves and for their own account respectively, and other than and except public officers drawing or preparing official instruments applicable to their respective offices, and in the course of their duty, shall forfeit and pay for every such offence the sum of fifty pounds: Provided always, that nothing herein contained shall extend, or be construed to extend, to prevent any person or persons drawing or preparing any will or other testamentary papers, or any agreement not under seal, or any letter of attorney."

(b) 2 M. & W. 149.

(c) Holt, N.P. 528.

agent for drawing an agreement for the sale of a medical practice, *Gibbs*, C. J., observed, that, supposing the plaintiff was obliged to take out a certificate under the 55 Geo. 3, c. 184, Sched. (A.) part 1, tit. "Certificate," the agreement would not, therefore, be invalid, though the plaintiff might subject himself to a penalty. In *Johnson v. Hudson* (a), it was held that a person dealing in tobacco without having taken out a license, as required by the 29 Geo. 3, c. 68, s. 70, might nevertheless maintain an action for tobacco sold by him. [*Platt*, B.—The Tipling Act, 24 Geo. 2, c. 40, s. 12, has prohibitory words.] This statute contains no prohibition, and the act in respect of which it imposes a penalty was not illegal at common law. [*Alderson*, B.—where the statute is passed for the protection of the public, as in the case of the 17 Geo. 3, c. 42, which requires bricks for sale to be of certain dimensions, and imposes a penalty for the breach of that regulation, the seller cannot recover for bricks sold under the statutable size : *Law v. Hodson* (b). *Parke* B.—The distinction taken in *Brown v. Duncan* (c), between the effect of a statute passed for revenue or for other purposes, was disclaimed by this Court in *Cope v. Rowlands*, where it was laid down, that, if the contract be rendered illegal, it is immaterial in point of law whether the statute which makes it so has in view the protection of the revenue or any other object.] This statute does not say that no person shall act as a conveyancer without taking out a certificate, but only that every person who shall so act shall have a certificate. [*Parke*, B., referred to *Gremaire v. Le Clerc Bois Valon* (d), *Wetherell v. Jones* (e).]

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Hayes contra.—The object of the enactment was not merely for revenue purposes, but in order to prevent unqualified persons from acting as conveyancers. According

(a) 11 East, 180.

(b) Id. 300.

(c) 10 B. & C. 93.

(d) 2 Camp. 144.

(e) 3 B. & Ad. 221.

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to the doctrine laid down in *Cope v. Rowlands* (a) and *Smith v. Mawhood* (b), if the Court can see that the Legislature intended to prohibit the particular act, it makes no difference that a penalty is imposed for revenue purposes. Now, the Act says, that every person, except the particular person named, who shall draw a conveyance without having a certificate, shall pay for such offence a certain sum. Therefore the statute, in express terms, makes the act an offence. Then follows a proviso, that nothing therein contained shall prevent any person from drawing a will, &c. Wherefore, therefore, the Legislature says that persons are not to be prevented from doing the one act, it must have been intended that they should be prohibited from doing the other. If revenue purposes were alone in view, the language of the proviso would have been, that nothing in the Act contained shall prevent any person from drawing a will *without having taken out a certificate*.—(He was then stopped by the Court.)

Tapping, in reply, argued that the clause being a penalty one ought to receive a strict construction.

PARKE, B.—I am of opinion that the defendants are entitled to judgment. The true principle is laid down in *Cope v. Rowlands* (a) and *Smith v. Mawhood* (b); and the question in all these cases is, whether, looking at the statute, the object of the Legislature in imposing a penalty was to prohibit the particular act, or whether it was for a different purpose. Therefore, the simple point which we have now to decide is, whether the Legislature intended to prohibit this act from being done under a penalty, and thus render it illegal; if so the plaintiff cannot recover. Now, looking at the statute, I am of opinion that the object of the Legislature was to confine the practice of drawing the instrumen

(a) 2 M. & W. 149.

(b) 14 M. & W. 452.

therein specified to a certain class supposed to have a competent knowledge of the subject, and to protect the public against the mistakes of inexperienced persons in matters of this kind; and with that view, the Legislature has prohibited these acts being done except by a particular class of persons. The object of the Legislature could not have been merely to secure to the revenue the duty on certificates, because it is only certain persons who can by law obtain such certificates. In that respect, the case is different from *Smith v. Marwood*, where the object of the Legislature was to compel the obtaining of licenses, which any one might obtain, to deal in a particular commodity.

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ALDERSON, B.—The question is very plain. The principle being admitted, what we have to consider is this, does the statute prohibit the act being done by an unqualified person, or does it merely require that every person who does it shall pay for a certificate. I think the former. The statute, after having declared that every person, except a particular class, who shall do the act without a certificate, shall be subject to a penalty, goes on to provide that nothing therein contained shall prevent any person from doing another particular act. If that act would not have been prevented except for the proviso, then its words have no meaning.

PLATT, B.—The statute was intended to prevent ignorant persons from drawing conveyances of serious import. The legislature makes an exception in favour of serjeants-at-law and other persons of education. That such is the object of the enactment appears more especially from the language of the proviso, which says, that the Act is not to “prevent” any person from drawing a will, &c.

MARTIN, B.—Upon carefully reading the enactment, it is obvious that it was intended to secure to a particular class the sole employment and practice in conveyancing.

Judgment for the defendants.

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June 21.

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S., by indenture, assigned to the plaintiff (amongst other things) his crops of grain upon his farm, as a security for money lent. By the indenture it was declared and agreed that it should be lawful for the plaintiff at any time to seize and take possession of

THIS action was brought to recover 294*l.*; and after the issuing of the writ, and by consent of the parties and order of a Judge, the following case was stated for the opinion of this Court without any pleadings:—

In the years 1846, 1847, and 1848, the plaintiff advanced from time to time to H. Small, who was then the owner and occupier of a dwelling-house and premises at Haversham in the county of Bucks, and also occupier of a farm and lands there, several sums of money by way of loan, amounting in the whole to 1006*l.* 18*s.* 7*d.*; and for securing their repayment, H. Small, by a deed dated the 26th of January, 1848, made the crops and other effects thereby bargained and sold, and all such crops and other effects which should or might from time to time be substituted in lieu of the crops thereby assigned, or which should from time to time be found on or about the farm, and the same to sell and dispose of, and out of the proceeds pay all costs and retain all monies due to the plaintiff. On the 21st of February, 1849, a sum of 1297*l.* 18*s.* 7*d.* being then due to him, the plaintiff seized and took possession of some crops of grain then growing on the farm, and which had been sown by S. subsequently to the execution of the indenture. In Trinity Term, 1848, the defendant recovered a judgment against S., and on the 22nd of February, 1849, a writ of *f. fa.* indorsed to levy 810*l.* 19*s.* 3*d.*, was issued on such judgment and delivered to the sheriff for execution, who on the same day seized the said crops. On the 8th of March, 1849, S. petitioned the Insolvent Court under the 7 & 8 Vict. c. 96. The official assignee in the first instance claimed the crops, and a bill was filed by him in the Court of Chancery to restrain the plaintiff from selling them, which bill was dismissed upon terms agreed on between the plaintiff and the assignee, and the latter then abandoned all claim to the crops. The sheriff afterwards sold the crops for 294*l.* which came to the hands of the defendant; and the plaintiff having sued the defendant for the same—

Held.—First, that, supposing the debtor had not petitioned the Insolvent Court, the plaintiff had a right to recover; for though the power to seize *future crops*, if unexecuted, would have been of no avail against the defendant's execution, since it gave no legal or equitable title to any specific crops, yet when the power was executed to the extent of the plaintiff's taking possession of the then growing crops, he was in the same situation as if the debtor himself had delivered them to him, and consequently his title would prevail against that of the defendant.

Secondly, that the circumstance of the defendant having petitioned the Insolvent Court subsequently to the seizure and *before the sale* of the crops did not affect the plaintiff's right, since the meaning of the 21st section of the 7 & 8 Vict. c. 96, is that no creditor under a bill of sale not completely executed before the petition, shall avail himself of it to the prejudice of the *general body of creditors*; and therefore, although this bill of sale was inoperative as against the assignee, yet, as he abandoned his claim, it was valid as against the defendant.

Seemle: that if the proceeds of the sale had been more than sufficient to satisfy the defendant's execution, as to the surplus, he would have been liable to the assignee, and therefore would have had a good defence against the plaintiff.

Held, also, that in the case of an execution founded on a warrant of attorney within the 108th sect. of the 6 Geo. 4, c. 16, the effect of that enactment is not to render the writ void, and thereby let in an execution at the suit of a subsequent adverse judgment creditor, but only to vary the legal operation of the writ, so as to render a sheriff who executes it liable in tort.

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between himself of the one part, and the plaintiff of the other part, after reciting that the plaintiff had lent to H. Small various sums of money amounting to the above sum, H. Small assigned and transferred to the plaintiff all his household goods in and about his said dwelling-house, and all his live and dead farming stock, crops of grain, and the whole of his personal estate in and about the same, and upon and about his said farm and lands: To hold the same unto the plaintiff, his executors, &c., as a security for the payment of the said sums of money, and of all such further sums as H. Small might thereafter owe and become indebted to the plaintiff, not exceeding in the whole 2000*l*. And by the said indenture it was declared and agreed, that it should be lawful for the plaintiff, his executors, &c., by virtue of the said indenture, at any time or times to seize and take possession of the said household goods, live and dead farming stock, crops of grain and hay, and other effects and premises thereby bargained and sold, and of all such live and dead farming stock, crops, and implements of husbandry, and other effects which should or might from time to time be substituted in lieu of the said stock, crops, and implements of husbandry thereby assigned, or any part thereof, or which should for the time being be found in or about the messuage or dwelling-house, farm, lands, and premises at Haversham aforesaid, or any or either of them, either in the lifetime or after the decease of the said H. Small, and the same to sell and dispose of by public auction or private contract in such manner as the plaintiff, his executors, &c. should deem expedient; and out of the monies which should arise from such sale to pay and discharge all costs, &c.; and after payment thereof to take and retain all monies due to the plaintiff, and pay the remainder to the said H. Small.

The plaintiff afterwards lent to H. Small other sums; and on the 21st of February, 1849, a sum of 1297*l*. 18*s*. 7*d*. being then due to him under the said deed, the plaintiff, un-

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der the powers thereby granted, seized and took possession (amongst other things) of some crops of grain then growing upon the said farm and lands, and which had been sown by H. Small subsequently to the execution of the said deed. The plaintiff on the same day placed a man in possession of the said crops, who remained in possession of the same on behalf of the plaintiff until the sale thereof as hereinafter mentioned. All this took place without any other license or consent on the part of H. Small beyond that contained in the said deed. The crops and other things were not of sufficient value to repay the plaintiff the amount then due to him from H. Small.

In Trinity Term, 1848, the defendant recovered judgment in an action brought against H. Small for the sum (including costs) of 310*l.* 19*s.* 3*d.*; and on the 22d February, 1849, a writ of fieri facias (indorsed to levy 310*l.* 19*s.* 3*d.* and interest at 4*l.* per cent., from the 15th August, 1848, till payment), was issued on such judgment, and delivered to the sheriff of Bucks for execution, who on the same day seized thereunder (amongst other things) the said crops of grain above referred to, and of which the plaintiff was then in possession as aforesaid. At that time a sum exceeding the value of the crops and other things seized under the said deed remained due to the plaintiff and is still unpaid.

On the 8th of March, 1849, H. Small presented his petition for protection to the Court for the relief of insolvent debtors, under the provisions of the 5 & 6 Vict. c. 116 and the 7 & 8 Vict. c. 96, which was duly filed under the said Acts. The official assignee, in the first instance, claimed the crops and other things seized as above mentioned by the plaintiff, and a bill was filed by him in the Court of Chancery, to restrain the plaintiff from selling the same. This bill was afterwards dismissed upon terms agreed on between the plaintiff and the assignee, and the latter then abandoned all claim to such crops and other things, and has not since claimed to have any title to the same.

The sheriff continued in possession of the crops under

the defendant's writ until the 25th of July, 1849, when the same were sold, and produced the sum of 294*l.*; and for the purpose of this case, it is to be taken that such sale was made by the sheriff under the said writ, and that the proceeds were received by the defendant.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover the value of the said crops. If the Court should be of opinion that he is so entitled, judgment is to be entered for the plaintiff for the sum of 294*l.* and costs. If the Court should be of a contrary opinion, judgment of non-pros with costs of defence is to be entered.

Phipson argued for the plaintiff (June 7 and 16).—The plaintiff is entitled as against the defendant to recover the proceeds of the crops sold under the execution. It is material to consider, in the first place, what would have been the right of the plaintiff, if Small, the debtor, had not become insolvent. The indenture of the 26th of January, 1848, empowered the plaintiff to take possession of and sell any goods and chattels which might thereafter be found on the premises of the debtor. That was a license by deed for a good consideration, and being coupled with an interest was irrevocable. As soon as it was executed by seizure, the plaintiff had a good title to the crops as against all the world. His right was the same as if the debtor himself had delivered them into his manual possession. The seizure having taken place before the delivery of the writ to the sheriff, he had no power to sell the crops. The plaintiff was in the situation of a pledgee having a lien on goods with a power of sale, in which case it is clear that the goods cannot be taken in execution, for a sheriff can only seize such things as he can sell: *Legg v. Evans* (a). [*Martin*, B, referred to *Howes v. Ball* (b). *Parke*, B.—The deed

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(a) 6 M. & W. 36.

(b) 7 B. & C. 481.

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only operates, as to the future effects, as an executory contract: *Lunn v. Thornton* (a).] There, the point decided was, that no property passes under a bargain and sale of goods not in existence, or at all events not belonging to the grantor at the time of executing the deed, unless he ratifies the grant by some act done by him with that view, after he has acquired the property. *Tindal*, C. J., in delivering judgment, observes, that "It is not a question whether a deed might not have been so framed as to have given the defendant a *power of seizing* the future personal goods of the plaintiff as they should be acquired by him and brought on the premises, in satisfaction of the debt." In *Freeman v. Edwards* (b) the license was executed after the bankruptcy of the grantor, and consequently the power to seize the goods was at an end, for they were no longer the goods of the bankrupt, but of his assignees. In *Muskett v. Hill* (c), it was held that a license to search for and raise metals and also to *carry them away*, operated not merely as a license but as a grant, and passed an interest which was capable of being assigned. A license coupled with a grant is irrevocable: *Wood v. Leadbitter* (d); and upon seizure the plaintiff had a special property in the crops: *Wickham v. Hawker* (e).

Then, assuming that the plaintiff would have had a good title to the crops as against the defendant if the debtor had not become insolvent, the question is, whether the right of the plaintiff is affected by the insolvency. The defendant seeks to set up the title of the assignees under the 7 & 8 Vict. c. 96, s. 21 (f), which provides, that, after the filing of a petition for protection from process, no person shall "*avail himself*" of a bill of sale executed by the petitioner, but shall be a creditor for his debt. But the defendant has no right to set

(a) 1 C. B. 379.

(b) 2 Exch. 732.

(c) 5 Bing. N. C. 694.

(d) 13 M. & W. 838.

(e) 7 M. & W. 63.

(f) See the section, post, p. 308.

up the title of the assignees, when they disclaim having any. *Simpson v. Wood* (a) decided, that, where the bill of sale is absolute before the filing of the petition, the defendant does not "avail himself" of it by selling the goods after the petition, and consequently the property does not vest in the assignees. Here, however, it is said, that, as there was a seizure only and no sale, the title of the plaintiff was incomplete; and that, having no title as against the assignees, he has none as against the defendant. But, unless the assignees interfere, the plaintiff, who had a special property in the crops by seizure under the bill of sale, has a good title against all persons. It is true, that, in *Goldschmidt v. Hamlet* (b), the Court of Common Pleas held, that, where the assignees of a bankrupt, under the 6 Geo. 4, c. 16, s. 108, successfully impeached an execution upon a judgment founded on a warrant of attorney, they were not entitled to the benefit of that execution; and that the effect of setting it aside was to let in a second adverse judgment creditor, as if he had been the sole execution creditor. The object, however, of that enactment, and also of the 7 & 8 Vict. c. 96, s. 21, which is similar in terms, was to give to the general body of creditors the benefit of the execution which was defeated. That is apparent from the latter part of the section, which says, that such execution creditor shall be paid rateably with the other creditors. The decision in *Goldschmidt v. Hamlet* was followed by the Court of Queen's Bench in *Graham v. Witherby* (c); but their judgment proceeded in a great measure on a mistaken notion of the law, as laid down by this Court in *Cheston v. Gibbs* (d). There the question was, whether *trover* would lie against a sheriff, who, having seized goods under an execution upon a judgment founded on a warrant of attorney, after an act of bankruptcy by the debtor but before the fiat, sold

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(a) 7 Exch. 349.

(c) 7 Q. B. 491.

(b) 6 M. & Gr. 187.

(d) 12 M. & W. 111.

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them subsequently to the issuing of the fiat; and this Court held, that the effect of the 108th section of the 6 Geo. 4, c. 16, was to vary the legal operation of the writ itself, and not merely to direct the application of the money levied under it. The Court of Queen's Bench, in *Graham v. Witherby*, considered that this Court decided, that the first writ was altogether void, and that, therefore, the second writ became, in effect, the first writ; whereas the Court only decided that the writ was void *as against the assignees*, so as to render the subsequent sale under it a wrongful act, for which they might maintain trover against the sheriff. In the course of the argument for the plaintiffs in *Graham v. Witherby*, *Wightman, J.*, puts this very point,—“Suppose, in a case where the execution was invalid by sect. 108, the assignees would not interfere; could the second creditor then contest the proceeds of the execution with the first?” The answer is, “he could not, because sect. 108 was intended for the benefit of the assignees representing the general creditors, not for the benefit of any individual creditor, whose execution might stand next in order to that which is defeated.” That applies here; the assignees having abandoned all claim, their title is gone, and the plaintiff is in the same situation as if there had been no insolvency.

Hayes for the defendant.—The plaintiff had a mere *license* to take possession of and sell any goods of the debtor found on his premises, and until that license was executed by sale the property in the goods remained unchanged. The plaintiff is in the same situation as that of a creditor, whose debtor told him to go on his premises, and take any of his goods in satisfaction of his debt. This is not the case of a power coupled with an interest. The license does not operate on any specific property, and is not even limited to the goods of the assignor. It is conceded, that, if the assignor, before his insolvency, had indicated his intention that particular goods should pass under the bill of sale,

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by putting them into the possession of the plaintiff, they could not have been afterwards seized by another party; but the mere act of the plaintiff taking the goods gave him no title, for the license could only be executed by seizure *and sale*. If it were otherwise, an attempt to execute a power would be equivalent to its execution. [*Parke, B.*, referred to *Burn v. Carvalho* (a).] In Bacon's Maxims (b), it is said: "Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiaturs effectum interveniente novo actu." The "new act" there mentioned is explained, in *Lunn v. Thornton* (c), to mean some act to be done by the grantor in furtherance of the original disposition. [*Parke, B.*, referred to *Petch v. Tustin* (d).] There the question was, whether a *potential* interest was intended to pass by a bill of sale; here the deed does not profess to give more than a mere authority, and which is of no avail until it is completely executed: *Gale v. Burnell* (e). [*Martin, B.*, referred to the judgment of *Vaughan, C. J.*, in *Thomas v. Sorrell* (f), as cited in *Wood v. Leadbitter* (g).] The distinction between a power and an interest is shewn by the case of *Howes v. Ball* (h).

Secondly, the power not having been executed by sale at the time of the debtor's insolvency, the property in the crops vested in his assignees. The 21st section of the 7 & 8 Vict. c. 96, expressly declares, that after the filing of the petition no person shall *avail himself* of a bill of sale. In *Simpson v. Wood* (i), the instrument was not a power to sell, but an absolute conveyance of the property, and the title of the creditor was complete before the filing of the petition, therefore it could not be said that he availed him-

(a) 1 A. & E. 883.

(b) Reg. 14.

(c) 1 C. B. 379.

(d) 15 M. & W. 110.

(e) 7 Q. B. 850.

(f) Vaughan, 351.

(g) 13 M. & W. 838.

(h) 7 B. & C. 481.

(i) 7 Exch. 349.

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self of the bill of sale by afterwards selling the goods. Then, the right of property being in the assignees, it is competent for the defendants to set up their title, in order to defeat the plaintiff's claim. There are many cases in which a defendant has been allowed to set up the *jus tertii*. In *Leake v. Loveday* (a), the purchaser of goods allowed the vendor to remain in possession of them when the latter became bankrupt. The assignees not having claimed the goods, they were taken in execution by the sheriff under a *fi. fa.*; and in trover by the purchaser against the sheriff, it was held that he might set up the title of the assignees. So, where the plaintiff claimed as assignee under a second commission under which the bankrupt had obtained his certificate, but his estate had not produced sufficient to pay 15s. in the pound, it was held competent for the defendant, who claimed as assignee under a subsequent fiat, to shew in answer to the plaintiff's claim that the property in the goods had vested in an assignee of the Insolvent Debtors Court: *Butler v. Hobson* (b). Other authorities are collected in *Leake v. Loveday*.

Phipson in reply.—*Newnham v. Stevenson* (c) is an express authority that the defendant cannot set up the title of the assignees. There goods had been transferred by a trader before his bankruptcy by an instrument which the jury found to be a fraudulent preference, and the transferee, after the bankruptcy and after the appointment of assignees, had brought an action for an illegal distress upon the goods, and it was held that it was not competent to the defendant to set up the title of the assignees, they not having asserted their right to the goods otherwise than by commencing an action to recover them. In *Leake v. Loveday*, the plaintiff was not in possession of the goods for which he brought trover, and therefore it was necessary for him to prove his

(a) 4 M. & Gr. 972.

(b) 5 Scott, 798.

(c) 10 C. B. 713.

title; and in answer to his case, the defendant was allowed to shew that the right of property and of possession was in a third person. *Butler v. Hobson* (a) also proceeded on the ground that the property not being in the plaintiff's possession, the defendant might shew that the right to it was vested in another person. Here the plaintiff was in actual possession, and as the assignees do not claim the property, his title is good as against all other persons.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—There are two questions in this case. The first, whether, supposing that Mr. Small, the debtor, had not become insolvent, the plaintiff had a good title to the growing crops as against the execution creditor. The second, whether his having become insolvent makes any difference.

Under the bill of sale it was conceded on both sides, that, though the *then* growing crops passed on the execution of the deed, yet the future crops did not. As to those, the plaintiff was authorised to seize and take possession of all or any that might be substituted for those then existing, and to sell and dispose of them, and pay the costs, &c., and apply the residue in payment of the debt secured by the bill of sale. And under this power the plaintiff seized and took possession of the growing crops in question on the 21st February, and the day after a writ of fi. fa. on the defendant's judgment, indorsed to levy 310*l.* 17*s.* 3*d.*, was delivered to the sheriff, who seized and afterwards sold them for 294*l.*, which came to the hands of the defendants.

The plaintiff contended, that, having actually taken possession of the growing crops before the delivery of the writ, he was lawfully in possession of them, and could bring an

(a) 5 Scott, 798.

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action against any one for taking them, and that his title ought to prevail against that of the defendant. And we think that he was so entitled.

If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title, nor even equitable title to any specific goods; but when executed, not fully and entirely, but only to the extent of taking possession of the growing crops, it is the same, in our judgment, as if the debtor himself had put the plaintiff in actual possession of those crops. Whether the debtor give the possession of a chattel by delivery with his own hands, or point it out and direct the creditor to take it, or tell him to take any he pleases for the payment of his debt by the sale of it, the effect, *after actual possession* by the creditor, is the same.

We all think, therefore, that, but for the Insolvent Act 7 & 8 Vict. c. 96, s. 21, the plaintiff had a right to recover. Nor should we have any doubt that the insolvency of the defendant, and his having petitioned the Insolvent Court subsequently to the seizure and before the sale under the bill of sale, made no difference, if we were unfettered by authorities on the subject. That question turns on the 21st section of the 7 & 8 Vict. c. 96, which provides, "That in all cases where any petitioner for protection from process whose estate shall have been vested in an assignee or assignees under the provisions of the said recited Act and of this Act or either of them, shall have executed any warrant of attorney to confess judgment, or shall have given any cognovit actionem or *bill of sale*, whether for valuable consideration or otherwise, no person shall, after the filing of the petition of such petitioner, avail himself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or cognovit actionem, either by seizure and sale of the property of such petitioner or any part thereof, or by sale of such property theretofore seized or any part thereof, or

avail himself of such bill of sale, but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or cognovit actionem, or of such bill of sale, shall and may be a creditor or creditors for the same under the said recited Act and this Act."

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This clause applies to all creditors by judgment on a warrant of attorney or by bill of sale, on which some further step is necessary to be done to make it effectual (as explained in the case of *Simpson v. Wood* (a),) and this bill of sale is of that nature, because, as to future crops, it required an actual seizure and sale to give it operation; but the meaning of the section clearly is, that no person shall avail himself of such a bill of sale to the prejudice of the general creditors under the insolvency, and take a larger share thereby of the effects than would fall to be distributed amongst all equally, if there were no such bill of sale. It makes, therefore, a *fi. fa.* on a warrant of attorney not completely executed by seizure and sale, and a bill of sale not completely executed to transfer the property before the petition, inoperative as against the assignees representing the general creditors.

In all cases, therefore, where the effect of the execution, or the operation of the bill of sale, would be to take away property from the assignees, the creditor cannot avail himself of it; but there is not the slightest reason for postponing such an execution or bill of sale, where the result of so doing would be to put the property seized into the hands of a subsequent execution creditor, and no part of it would go to the assignees for the benefit of the general creditors entitled to share the insolvent's effects in rateable proportions.

In the present case, the plaintiff, a creditor with a bill of sale to secure 1297*l.* 18*s.* 7*d.*, seeks to enforce it by the

(a) 7 Exch. 349.

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seizure and sale of effects which produced 294*l.*, and which the defendant claims as due to him under an execution for 310*l.* 19*s.* 3*d.* The consequence of holding that the plaintiff's bill of sale was inoperative altogether, would be to give the 294*l.* to the defendant, and nothing whatever to the assignees; they, and the general creditors through them, would not profit in the least. Therefore, if there be no binding authority to the contrary, we should hold, that the plaintiff, who had a prior right by virtue of his bill of sale against every execution creditor, though not against the insolvent's assignees, had a clear right to recover the proceeds in this case, even if those assignees had not, as they have done, withdrawn from contesting the plaintiff's right.

What the effect would be, if the sheriff had seized more and sold more goods of the insolvent than would satisfy the defendant's execution, is another question not now necessary to be decided; but as to the surplus, as he would probably be liable to the assignees, he might have a good defence against the plaintiff.

The only question which remains is, whether there are any authorities against the plaintiff. The first relied on is *Goldschmidt v. Hamlet (a)*. The question between the creditor on a judgment on a warrant of attorney and the first creditor on an adverse judgment was not the subject of any one issue, and was never presented in a proper shape to the Court in the course of the argument, as a direct subject of decision. The observations of the Judges on the other issues, no doubt, were unfavourable to the plaintiff's case, but the assignees being in that case clearly entitled to nothing, the Court do not seem to have fully considered the question as to the right against the first and other execution creditors.

A similar observation may be made on the case of *Gra-*

(a) 6 M. & Gr. 187.

ham v. Witherby(a), which proceeded partly on that of *Goldschmidt v. Hamlet*. Many of the observations made by Lord *Denman*, in giving judgment, are decidedly favourable to the view we take, and the decision appears to have been founded on a mistaken view of the meaning of this Court in the decision of the case of *Cheston v. Gibbs* (b). This Court decided that the 108th section of the 6 Geo. 4, c. 16, affected the operation of the writ, and did not merely direct the application of the money levied under it; and that the sheriff was a wrongdoer in acting contrary to the statutory direction coupled with those of the writ. We never held the writ to be void, as the Court of Queen's Bench seems to have supposed, in *Graham v. Witherby*, p. 515, and thence deduced the consequence that it was void altogether, and so the defendant's writ in that case was therefore the first valid writ. We never meant to say more, than that the sheriff, in disobeying the writ and the clause in the Act of Parliament directing its operation, was dealing wrongfully with the goods which but for that writ would be the property of the assignees, and therefore responsible in an action of trover. We cannot, therefore, consider that either of these cases bind us as authorities, and we pronounce our judgment for the plaintiff.

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Judgment for the plaintiff.

(a) 7 Q. B. 491.

(b) 12 M. & W. 111.

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WHITE and Another *v.* CRISP and Others.

Where a vessel is sunk by unavoidable accident in a public navigable river, whether in the usual track of navigation or not, it is the duty of the owner, so long as he continues to have the possession and control of the vessel, to take due precaution to prevent injury to other vessels by their striking against it; and this obligation may be transferred with the transfer of the possession and control to another person; and, on the abandonment of the possession and control, the obligation ceases.

THE declaration stated, that, before the happening of the damage and injury hereinafter mentioned, a certain ship or vessel of and belonging to a certain person, to wit, one John Cook, and of which the said person was then in possession and of and over which the said person then had the command, management, direction, and control, to wit, by his marine and servants in that behalf, the same being then laden with a certain cargo, to wit, of and belonging to the said person, foundered, sunk, and went to the bottom at and in a certain navigable part and place of and in the Bristol Channel, to wit, commonly called and known as the Cardiff Sands, the said part and place of the said channel being one where no obstruction to the navigation previously existed, at that time, and from thence hitherto, and still being a public highway for all persons to navigate, and pass and repass, by and with their ships and vessels at their free will and pleasure, and in and along which divers ships and vessels were and are used and accustomed to be navigated, and pass and repass, without obstruction. And the said ship or vessel of and belonging to the said person, together with the said cargo therein, having so sunk and foundered as aforesaid, the same then lay in the said navigable part and place of and in the said channel, under water there, and wholly covered, and concealed, and out of view, in such a position and at such a depth, that vessels in navigating and passing in, along, and over the said part and place where the said vessel so lay sunk as aforesaid, would necessarily be, and were, in danger, (unless the persons navigating and directing the same had notice of the said sunken vessel so laying as being there), of striking and being dashed against the same and thereby of being greatly damaged and injured. That after the said ship or vessel had so sunk and foundered

aforesaid, and whilst the same, together with the said cargo then being therein, so remained and continued sunken under water, covered, and concealed, and before the happening of the damage and injury hereinafter mentioned, the said person to whom the said ship or vessel so belonged as aforesaid, to wit, for a large sum of money paid to him by the defendants in that behalf, transferred the possession of the said ship or vessel to the defendants, and sold and assigned to them the said cargo, in order that the defendants, for their own use and benefit, might raise and bring the same ship or vessel to the surface, and make a profit thereof and of the cargo then being therein ; and then relinquished and gave up to the defendants the control, management, and direction thereof, and the defendants then, and before the happening of the damage and injury complained of, accepted the said transfer, and at the time of such acceptance, took possession of the said ship or vessel and of the said cargo for the purpose aforesaid, and thenceforward, up to and until, at, and after the happening of the injury and damage hereinafter mentioned, had and exercised the possession, control, management, and direction thereof. That, although the defendants well knew the premises, and could, and might, and ought to have done their duty therein, they suffered and permitted the said vessel, after the said transfer and their said acceptance thereof, and after they so as aforesaid assumed and took possession of the said vessel, and so as aforesaid had and exercised the possession, control, management, and direction thereof, to be and continue sunk and lying, and the same did continue sunk and lying in the said part and place of and in the said channel, under water, there covered, concealed, and out of view, in such position and at such depth as aforesaid, for a long and unreasonable time, to wit, from the time of their said acceptance of the said transfer and of their taking such possession as aforesaid, until the happening of the damage and injury hereinafter mentioned, without taking, or causing to

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be taken, any proper care or precaution in that behalf, and without using, or causing to be used, any due or proper means to prevent or guard against the said danger, or whereby the said danger might be prevented and guarded against, to vessels then navigating in and along the said part of the said channel, and without putting and placing, or causing to be put and placed, in the said part, any proper or sufficient buoy or other proper and sufficient mark or signal, to give due notice and warning of the said danger. That whilst the said vessel was and continued so lying without any proper or sufficient buoy, or other proper or sufficient signal, or any other due or proper means being used to give notice or warning of the said danger, and after the defendants had so as aforesaid accepted the said transfer, to wit, on &c., the plaintiffs were lawfully possessed of a certain vessel, which was then lawfully navigating and passing in and along the said part and place of and in the said channel, under the care, direction, and management of certain mariners and servants in that behalf of the plaintiffs, and the said vessel being then so navigated and passing in and along the said part and place of and in the said channel, and the plaintiffs and the said mariners and servants not having any knowledge, or sufficient means of knowledge of the said danger, and no due and proper care or precautions being taken by the defendants to prevent or guard against the same, and the plaintiffs, by their said mariners and servants, then having lawful occasion to navigate and direct their said vessel in, along, and over the said place where the said ship or vessel so then lay sunk as aforesaid; the plaintiffs, by their said mariners and servants, did then accordingly navigate and direct their said vessel in, along, and over the said place, and thereby, and by means of the premises, and of the said misconduct, omission, and neglect of the defendants, and without any neglect or default of the plaintiffs or their mariners and servants, the said vessel of the plaintiffs was then driven and struck with great force

and violence upon and against the said sunken vessel, and was thereby then greatly broken, stove in, damaged, and injured.

Demurrer, and joinder therein.

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Second plea—That, at the time of the alleged injury and damage to the plaintiffs' vessel, the said ship or vessel belonging to the defendants was sunk and lying on a certain sand bank, out of the usual course and track of navigation, and in a part of the said channel where vessels do not ordinarily pass over, unless driven by stress of weather, and repass, while navigating the said channel.

Fourth plea—That, after the defendants accepted the transfer of the said ship or vessel, they used all reasonable efforts to remove the same from the place where it was lying, but were wholly unable, at any time before the said time when &c., to remove it; and that by reason thereof, before and at the said time when &c., they had wholly abandoned and ceased to have any possession of the said ship or vessel.

Demurrers to pleas, and joinders therein.

Channell, Serjt. (*H. J. Ball* with him) argued for the plaintiffs (June 5).—First, the declaration is good. *Brown v. Mallett* (a) is an authority in point. There the declaration did not state that the owner of the sunken vessel had the possession and control of it at the time of the collision, and consequently no duty was cast on him to use any precaution to prevent other vessels from striking against it. Here, there is an express allegation, that, at the time of the injury, the defendants "had and exercised the possession, control, management, and direction" of the sunken vessel. Therefore the case is brought within the principle laid down in *Brown v. Mallett* (a), viz. "that it is the duty of a person using a public navigable river with a vessel of which he is

(a) 5 C. B. 599.

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possessed, and has the control and management, to use reasonable skill and care to prevent mischief to other vessels; and that, in case of a collision arising from his negligence, he must sustain, without compensation, the damage occasioned to his own vessel, and is liable to pay compensation for that sustained by another navigated with skill and care; and this liability is the same, whether his vessel be in motion or stationary, floating or aground, under water or above it." If, in point of fact, the defendants abandoned the possession and control of the sunken vessel before the collision took place, they should traverse the allegation of possession. This declaration, on the face of it, charges a sufficient breach of duty. It is not like that in *Hancock v. The York, Newcastle, and Berwick Railway Company* (a), which stated that the defendants were possessed of a mooring anchor, which was kept by them fixed in a known part of a navigable river, covered by ordinary tides; that the anchor had become removed into and remained in another part of the river, covered by ordinary tides, not indicated, whereof the defendants had notice, and although they had the means and power of refixing and securing the anchor, and indicating it, they neglected so to do, whereby the plaintiffs' vessel, whilst sailing in a part of the river ordinarily used by ships, ran foul of and struck against the anchor, and was thereby damaged. There it was not alleged that the defendants were privy to the removal of the anchor, nor did it appear that it was their duty to refix and indicate it. In *Harmond v. Pearson* (b), Lord Ellenborough, C. J., said, "It is a peremptory law of navigation, that, when any substance is sunk in a navigable river, so as to create danger, a buoy shall be placed over it, for the safety of the public." That case is supposed to conflict with *Rex v. Watts* (c); but the latter case only decided that no *indictment* would lie against the owner

(a) 10 C. B. 348.

(b) 1 Camp. 515.

(c) 2 Esp. 675.

for not removing a vessel sunk in a navigable river by accident or misfortune. Then, assuming that a duty was cast on the defendants to use proper means to prevent injury to other vessels, the second plea is clearly bad; for the duty must exist equally, whether the obstruction is in a part of the river where vessels occasionally pass, or where they ordinarily pass. It is conceded that the fourth plea is only objectionable as amounting to an argumentative denial of the sunken vessel being in the possession and control of the defendants.

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Bovill for the defendants.—First, the declaration does not disclose any cause of action. Where a vessel has sunk in a public navigable river without any fault of the owner, he is under no legal obligation to guard against danger to the vessels navigating the river. So far as the public are concerned, the Legislature has provided a remedy by the 19 Geo. 2, c. 22, s. 3. Then on what does the supposed obligation in this case rest? There is clearly no duty of a public nature for the breach of which the party may be indicted; and unless an indictment will lie for a public wrong, no action can be maintained in respect of the private damage to an individual. *Re v. Watts* (a) is the first case in which any trace can be found of an attempt to make the owner of a sunken vessel responsible; and there Lord *Kenyon* said, "that it would be adding to the calamity to subject the party to an indictment for what had proceeded from such causes, against which he could not guard, or which he could not prevent." *Hammond v. Pearson* (b), when examined, will be found to be no authority in support of the plaintiffs' proposition. There it seems to have been assumed that the defendant was bound to give some notice of his sunken ship, and the only question was, whether the notice which he gave was sufficient. In *Brown v. Mallett* (c), the only question was, whether the owner of a vessel sunk by acci-

(a) 2 Esp. 673.

(b) 1 Camp. 515.

(c) 5 C. B. 599.

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dent was bound to use any precaution to prevent injury to other vessels; and it was held that he was not. In that case it was unnecessary to decide whether he would have been liable if the sunken vessel had been in his possession or control, and the observations of the Court to that effect were extrajudicial. It is clear, from the case of *Hancock v. The York, Newcastle, and Berwick Railway Company* (a), that the mere circumstance of the defendants being the owners of the sunken vessel creates no obligation or liability. It is not suggested that the vessel was sunk through their negligence. [*Alderson, B.*—Suppose a person had been killed by the collision of the vessels, would the defendants have been subject to an indictment for manslaughter?] The foundation of the action is a nuisance to a public navigable river, and, if it can be maintained, the defendants would be liable to indictment for a public injury. It is difficult to say when any duty arose. Certainly not when the vessel was sunk, for it is conceded that if the owners had then abandoned the possession and control of it, they would not have been liable. Then, suppose they retain the possession and control of the vessel, but are unable to remove it, what duty can arise? There is no obligation on the owner of a sunken vessel to raise it from the bottom of the sea; and the placing a buoy to mark the spot might create a nuisance. Moreover, it is not alleged that the defendants could have raised the vessel, or that they could have given any warning against danger; and it is consistent with the facts stated, that the weather was so rough, or the navigation so dangerous, that they could not fix a buoy; or it might be, that, while they were attempting to raise the vessel, a rope broke, and so the accident happened. Unless the particular facts raise a duty, the allegation of duty is of no avail: *Seymour v. Maddox* (b). If the defendants are bound to place a buoy, how long are they to

(a) 10 C. B. 348.

(b) 16 Q. B. 395.

keep it there? At all events, such duty exists where the sunken vessel is out of the usual course and track of navigation; and, consequently, the second plea is good. A private individual can only interfere with a nuisance so far as is necessary to exercise his right of passing along the highway: *Dimes v. Petley* (a) and *Mayor of Colchester v. Brooke* (b).

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Channell, Serjt., replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—In this case, we have to consider whether the declaration contains a sufficient statement of the defendants' liability. It states that before the happening of the injury of which the plaintiff complains, a ship belonging to John Cook, and in his possession, management, and control, and laden with a cargo, foundered and sunk in a certain navigable part of the Bristol Channel, where no obstruction to navigation previously existed, and which was a public navigable highway for ships: and that the said ship lay there, wholly concealed and covered with water, in such a position, and at such a depth, that other vessels would necessarily be in danger of striking against it, unless they had notice of its being there. The declaration then stated, that after the said ship had so foundered and so lay there, John Cook, for a sum of money, transferred the possession of the said ship to the defendants, and sold the cargo to them, that they might for their own profit raise to the surface and make a profit of the ship and cargo, and then relinquished to the defendants the control, management, and direction thereof: and the defendants, before the injury complained of, accepted the transfer, and at the time of the acceptance

(a) 15 Q. B. 276.

(b) 7 Q. B. 339.

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took possession of the ship and cargo for the purpose aforesaid, and thenceforward, up to, and until, and at, and after the happening of the injury complained of, had and exercised the possession, control, management, and direction thereof. The plaintiffs then aver, that though the defendants well knew the premises, and could have done their duty in that behalf, yet they suffered the ship, after the transfer and after their acceptance of possession, and whilst it was in their possession, control, management, and direction, to continue so sunk and lying in the navigable channel for an unreasonable time, and until the injury thereafter mentioned, without taking proper care and using proper means to prevent accident, and without placing any buoy or mark to give notice of the place where she lay. The declaration then averred the injury happening to plaintiffs' vessel by striking on the wreck. To this declaration there was a demurrer.

The defendants also, by their second plea, stated that the wreck was lying in a part of the navigable channel not ordinarily passed over by vessels except during stress of weather; and by their fourth plea, that they used all reasonable means for removing the wreck, but were wholly unable before the time when &c. to do so, and that by reason thereof, before and at the time when &c., they had wholly abandoned and ceased to have any possession of it.

To these pleas were demurrers, and it is clear, we think, that the second plea is bad. It does not deny that the wreck lay in the navigable part of the channel, and whether that part be more or less frequently used seems to us a mere question of degree, and unimportant to the plaintiffs' right of action. This demurrer must therefore be allowed.

The real questions, however, arise on the declaration and fourth plea. This subject was discussed by Mr. Justice *Maule*, in an elaborate judgment, in the case of *Brown v. Mallett* (a), and from the principles there laid down by him,

(a) 5 C. B. 599.

(which, however, were not all absolutely necessary for the decision of that individual case), we do not disagree at all. He there lays it down thus—that it is the duty of a person using a navigable river with a vessel of which he is possessed and has the control and management, to use reasonable skill and care to prevent mischief to others; and he adds that his liability is the same whether his vessel be in motion or stationary, floating or aground, under water or above it. For in all these circumstances, the vessel may continue to be in his possession and under his management and control. This duty arises out of the possession and control of the vessel being in him. And it is clearly also laid down in the same judgment that this liability may be transferred with the transfer of the possession and control to another person. And further, that on the abandonment of such possession, control, and management, the liability also ceases. But it is also clear, from *Rex v. Watts* (a), that, from an unavoidable accident producing the wreck of a vessel, no duty arises to the owner to take any precautions, or to remove the impediment to navigation which it creates. There is no reason for throwing on the owner any special share in the consequence of what may be considered as a misfortune, both to him and the public. Now here, if we apply these principles to this declaration, we find a distinct averment, that up to and at the time of the injury to the plaintiffs' vessel, the defendants, to whom the sunken ship had been transferred, had and exercised the possession, control, management and direction thereof. Now, we understand by this, that the defendants had it in their power, by due care and exertion, to have altogether removed this vessel, or to have shifted at least its position, and so might reasonably have been able to have prevented the injury. If these words do not mean this, we think there was no liability on the part of

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(a) 2 Esp. 675.

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the defendants. But this being the meaning of these words, we think the declaration sufficient, and that the demurrer to it must be overruled. If there be not already a plea to that effect, the defendants should be at liberty now to traverse this averment, and this point, as to the above construction of the words "control, management, and direction," will be stated to the jury as the direction.

The fourth plea we think good, and, indeed, my brother *Channell* very candidly admitted this at the time of the argument. It is clear that either the original owner, or the transferee of the wreck, may abandon it, and so put an end to his liability. Then the plea states, that he had done so, adding a very sufficient reason for his doing it, before the time when the injury to the plaintiffs' vessel occurred. The demurrer, therefore, to the fourth plea, must be overruled.

Judgment, allowing demurrer to second plea,
and overruling demurrer to fourth plea;
and to the declaration, with liberty to
defendants to add another plea to the de-
claration, if so advised.

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July 7.

THE declaration stated, that, in September, 1853, the defendant agreed with the plaintiff to sell to him 100 tons of Petersburg clean hemp, expected to arrive at Liverpool by certain ships, namely, fifty tons by the ship *George Green*, and fifty tons by the ship *Trina*, at the price of 34*l.* per ton from the quay, and on the terms, that, if the ship or ships should be lost, or the hemp damaged on the voyage, the said contract should be considered void for such quantity as might be lost or damaged, the quality to be of fair average of the season; and, if any dispute should arise, the same should be settled by arbitration. Payment to be made by the plaintiff by six months' acceptance, or cash in fourteen days, less two and a half per cent. discount, at the buyer's option, and on the terms of customary allowances.—Averments: that, after the making of the contract, the ship *George Green* arrived at Liverpool with fifty

The plaintiff employed a broker to purchase for him some hemp. The broker, having negotiated with the defendant, signed and sent to him a note of the purchase of 100 tons of hemp, to arrive by certain ships; "payment, at the option of the buyer, by acceptance at six months from delivery, or cash in fourteen days less two-and-a-half per cent. to be taken

from the quay at the landing weights." The defendant afterwards signed and sent to the broker a note, differing in several material points from the note sent to him. On the 18th of September, a ship arrived with 50 tons of hemp, and on the 28th was warehoused at the broker's verbal request. On the 3rd of October the plaintiff declared his option to pay by bill. The defendant afterwards tendered to the broker delivery orders for "about" 50 tons of hemp, but the broker refused to receive them and give the plaintiff's acceptance, on the ground of the quantity being so described, and the defendant in consequence resold the hemp. The plaintiff then sued the defendant for not delivering the hemp, and declared on the note signed by the defendant as the contract between them. *Held*:—First, that it was a question for the jury whether both parties intended that the note signed by the defendant should be the contract, in which case there was a sufficient memorandum within the Statute of Frauds; or whether the defendant never intended to be bound as seller unless the buyer also signed a correlative note to bind him, and if so, there was no valid contract.

Secondly, that evidence was admissible to prove that, by usage of trade, the delivery orders were in the usual form when goods were warehoused in bulk; and when that evidence was coupled with proof that the goods warehoused were actually of that weight at the landing scales, and that the particular orders referred to the identical goods so weighed, such delivery orders were a sufficient performance of the contract to deliver.

Thirdly, that the parol agreement to alter the written contract to deliver the hemp on the quay by substituting a delivery from the warehouse, did not operate as a new contract so as to be a waiver or discharge of the old one; for such agreement was void by the Statute of Frauds. But if the plaintiff had accepted the goods in the warehouse, or even the delivery orders in the form offered, as a performance of the contract on the defendant's part, there would have been a good answer by way of accord and satisfaction.

Querr.—Whether the plaintiff declared his option and was ready to give his acceptance in due time.

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tons of such hemp on board, and not damaged, and the quantity of fifty tons of hemp thereupon became deliverable to the plaintiff, according to the terms of the said contract, and the plaintiff was at all times ready to accept the said quantity of fifty tons of hemp, according to the said contract, and to exercise his option, and to pay for the same by a six months' acceptance; and the plaintiff did all things necessary to be done by him in order to entitle him to have the said fifty tons of hemp delivered to him; and a reasonable time for the delivery expired before this action; of all which the defendant had notice. Yet the defendant broke his contract, and did not deliver to the plaintiff from the quay or elsewhere, fifty tons of the hemp arrived as aforesaid by the ship *George Green*, and no part of the said hemp was ever delivered to the plaintiff, &c.

Pleas (inter alia): First, that it was not agreed as alleged; thirdly, that, within a reasonable time for the delivery and acceptance of the said quantity of fifty tons of hemp, the defendant was ready and willing, and offered, to deliver to the plaintiff the said hemp, but he refused to accept the same from the defendant; fourthly, that, after the making of the agreement and before any breach thereof, the agreement was mutually rescinded by the plaintiff and the defendant.—Issues thereon.

At the trial, before *Platt, B.*, at the last Liverpool Spring Assizes, the following facts appeared:—In September, 1853, the plaintiff, who resided at Douglas, in the Isle of Man, employed one Wilks, a flax and hemp broker at Liverpool, to purchase for him some hemp. Wilks, having negotiated with the defendant, sent him the following note:—

“ Liverpool, 8th of September, 1853.

“ Sold, per Mr. James Campbell, to Mr. W. F. Moore, Douglas, Isle of Man, 100 tons of Petersburg clean hemp, to arrive per *Trina* and *George Green*, at 34*l.* per ton; payment, at the option of the buyer, by acceptance on Lon-

do at six months from delivery, or cash in fourteen days less two and a half per cent., to be taken from the quay at the landing weights, and to be of fair average quality for the season.

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Wilks afterwards received from the defendant the following note:—

" 15, Rumford-street, Liverpool,

" Mr. John Wilks,

" 8th of September, 1853.

" I have this day sold through you the following goods to Mr. W. F. Moore:—

" 50 tons Petersburg clean hemp, expected to arrive per George Green.

" 50 tons per Trina.

" 100 tons at 34*l*. per ton from the quay.

" If the ship or ships are lost, or the hemp damaged on the voyage, this contract to be considered void for such quantity as may be lost or damaged. The quality to be of fair average of the season, and, if any dispute arises, the same to be settled by arbitration.

" Payment, six months acceptance, or cash in fourteen days less two and a half per cent. discount, at the buyer's option. Yours, respectfully,

" Customary allowances.

" JAMES CAMPBELL."

Campbell, who was a broker, had sold the hemp on behalf of one Smith, a merchant, who had contracted with Messrs. Bohtlingk & Co. and Messrs. Telo & Prange, Russia merchants in Liverpool, to purchase the hemp of them. On the 18th of September, the George Green arrived at Liverpool with the fifty tons of hemp. On the 28th of September, the defendant called on Wilks, and shewed him the following letter from Messrs. Bohtlingk & Co. to Smith:—

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" 9, Romford-place, 28th of September, 1853.

" Sir,—There are now about thirty-five tons clean hem
 ex George Green on the quay of your lot, which, if not
 taken away this afternoon, we shall store at your risk an
 expense.

" We further beg to remark to you, that, in delivering to
 you the hemp afterwards ex warehouse, we shall not weigh
 it, but you must take it at the landing weight. We are
 your obedient servants,

" BOHTLINGK & Co.

" W. W. Smith, Esq."

After reading this letter, Wilks requested that the hemp
 might be warehoused on the plaintiff's account, and the
 defendant having communicated with Messrs. Bohtlingk
 they warehoused the fifty tons, which was fully landed on
 the 30th of September, thirty tons in a warehouse of their
 own, and twenty tons in a warehouse of Messrs. Dean & Co.
 On the same day the defendant made out in his own name
 and sent to Wilks a bill of parcels.

On the 3rd of October, Wilks wrote to the defendant as
 follows:—

" Dear Sir,—I have a letter this morning from Mr. W.
 F. Moore. You are to draw upon him for the amount of
 the hemp, as soon as you are in a position to transfer it.
 Please to let me know also where it is stored, and the rest
 and oblige Yours truly, " JOHN WILKS."

On the 15th of October, Smith paid Messrs. Bohtlingk
 & Co., and obtained delivery orders for the fifty tons of
 hemp. On the 17th, the defendant called on Wilks with
 the delivery orders, which were as follows:—

" Mr. John Wilks.

" October 15th, 1853.

" Sir,—We hold to your order about twenty-two tons of
 hemp ex George Green, lying in William's, 1 Brook-street
 at 6*d.* per ton per week, from October 9th, 1853, twenty-
 eight days certain.

" WILLIAM DEAN & Co."

" Liverpool, 15th of October, 1853.

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" W. H. Smith, Esq.

" Sir,—We hold to your disposal about thirty tons St. Petersburg clean hemp ex George Green, lying 9, Romford-place.

" BOHTLINGK & Co."

" Messrs. Bohtlingk & Co.

" Please to transfer the following goods to the order of Mr. John Wilks, the whole of the hemp specified in the annexed transfer note, and oblige " W. H. SMITH.

" 3, High-street, Liverpool, 15th of October, 1853."

Wilks refused to give the defendant the plaintiff's acceptance and to receive the above orders, on the ground that the quantity was therein described as "about" fifty-two tons; and the defendant, in consequence, resold the hemp. Evidence was tendered on behalf of the defendant, to prove, that, according to the course of business in Liverpool, when goods were warehoused in bulk, it was usual for the warehouseman, in describing the quantity, to insert in the delivery order the word "about," in order to protect himself against deficient weight. This evidence was objected to, and the learned Judge refused to receive it.

It was submitted, on behalf of the defendant, first, that there was no binding contract, since the bought and sold notes differed in some material particulars; and *Sievwright v. Archibald* (a) was relied on; secondly, that the original contract (if any) was to deliver the hemp on the quay by landing weight, and that such contract was rescinded before breach, and another contract substituted, viz. to deliver from the warehouse. The learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him on the above points.

Hugh Hill, in the following Term, obtained a rule nisi

(a) 17 Q. B. 103.

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accordingly, or for a new trial, on the ground of the rejection of evidence; against which

Knowles and Aspland now shewed cause.—First, the contract alleged in the declaration was proved. The 17th section of the Statute of Frauds, 29 Car. 2, c. 3, does not require the contract to be signed by both parties, but only by the party to be charged by it, and that has been done here. This is not the ordinary case of bought and sold notes made out by a broker acting for both parties, but it is a contract made, on the one side by the principal, and on the other by a broker. A memorandum of the contract is sent by the broker to the defendant, and he, finding that it is not the contract which he agreed to, alters the memorandum and then signs it. That is binding on his part. In *Rowe v. Osborne* (a), Lord *Ellenborough* ruled, that a vendee of goods is bound by the contract as stated in the note signed by him and delivered by the broker who effected the sale to the vendor, although this note varies from the note delivered by the broker to the vendee. That authority was recognised and adopted in *Cowie v. Remfry* (b). [*Parke, B.*—The question is, whether the defendant meant to bind himself unless there was some correlative note to bind the plaintiff.]

Secondly, evidence was not admissible to prove, that, according to the usage of trade, the delivery orders were in the usual form where goods were warehoused in bulk. The effect of such evidence would be to alter the terms of the written agreement by parol testimony. The contract was for the purchase of an entire quantity of fifty tons; but the evidence, if admitted, would tend to shew that the contract was for some uncertain quantity, *about* that weight. The case is not distinguishable from *Powell v. Edmunds* (c), where the printed conditions of the sale of

(a) 1 Stark. Rep. 140. (b) 5 Moo. P. C. 232. (c) 12 East, 6.

growing timber omitted to state the quantity; and it was held, that parol evidence was not admissible to prove that the auctioneer at the time of sale warranted a certain quantity. In *Blackett v. The Royal Exchange Assurance Company*(a), the action was brought on a policy of insurance in the usual form, on a ship, her tackle, boats, &c.; and it was held, that evidence of usage that the underwriters never pay for the loss of boats slung upon the outside of the ship upon the quarter, was inadmissible. Lord *Lyndhurst*, C. B., in delivering the judgment of the Court, says, "Usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain."

Thirdly, the original contract was not rescinded by the substitution of a new contract. The delivery of the goods from the quay was a material part of the contract, and that could not be varied by parol. It is well established, that, where a contract is required to be in writing by the Statute of Frauds, it cannot be altered by a verbal agreement: *Goss v. Lord Nugent*(b), *Stead v. Dawber*(c), *Harvey v. Graham*(d), *Stowell v. Robinson*(e). This is not the case of a substituted agreement and its performance being accepted in satisfaction of a breach of contract: *Smith v. Trowsdale*(f).

Hugh Hill and *J. Henderson* in support of the rule(g).
—The plaintiff did not declare his option to pay by his acceptance until after the hemp was warehoused. Therefore, at the time his option was declared, an act had been done, with the concurrence of both parties, which rendered the performance of the original contract impossible. That operated as a new contract, embodying all the terms of the old

(a) 3 C. & J. 244.

(b) 5 B. & Ad. 58.

(c) 10 A. & E. 57.

(d) 5 A. & E. 61.

(e) 3 Bing. N. C. 928.

(f) 3 E. & B. 83.

(g) They were requested by the Court to confine their arguments to the points as to the rescission of the contract and the admissibility of the evidence.

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contract, except the delivery on the quay by the landing weight. A new substituted agreement may exist, although it is incapable of being enforced by action. In *Stead v. Dawber*(a), Lord Denman, C. J., delivering the judgment of the Court, says, "Independently of the statute, there is nothing to prevent the total waiver, or the partial alteration, of a written contract not under seal by parol agreement; and, in contemplation of law, such a contract so altered subsists between these parties; but the statute intervenes, and in the case of such a contract takes away the remedy by action." A subsequent inconsistent agreement between the same parties discharges a previous agreement: Com. Dig. Action on the Case upon Assumpsit(G). There being then a binding agreement, that the hemp should be warehoused and delivered from the warehouse, it must be assumed that the parties intended to incorporate with it the usage of trade as to delivery. Such a form of order is necessary for the protection of the warehouseman, since the goods might decrease in bulk after they were warehoused. If these orders are in the usual and customary form, there was that species of delivery for which the plaintiff impliedly contracted when he consented to the goods being warehoused. The evidence of the usage of trade was therefore necessary, and improperly rejected.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case, my Brother *Platt* reserved a question on the trial for the consideration of the Court, as to the effect of two notes put in on the part of the plaintiff, in order to prove the contract alleged in the declaration. The two notes differed in several material points, and if this were a case in which the plaintiff sought to prove the contract by means of bought and sold notes, made by a broker for both parties, he must have failed in that case, for, the

(a) 10 A. & E. 57.

two notes disagreeing, there could be no valid contract. But this is not the case of a contract entered into by a broker for buyer and seller. Wilks was, indeed, a broker, but he acted solely for the plaintiff. The plaintiff then insisted that the note signed by the defendant is the contract, and the declaration agrees with it; and if it be true that this was intended by both parties to be the contract between them, the defendant would be bound as the party to be charged, and the memorandum would be sufficient within the Statute of Frauds. But if Campbell, the defendant, never intended to be bound as seller unless Moore was also bound as buyer, and meant that Moore should sign a note on his part so as to bind him, then there has been no valid contract between them. We cannot ascertain this point ourselves, and therefore there must be a new trial.

Some other questions are to be considered, which may be material on the new trial.

An objection was taken to the ruling of my Brother *Platt*, as to the rejection of evidence of the usage of trade as to delivery orders where goods are warehoused. The defendant tendered in evidence delivery orders for "*about* fifty tons," and also offered to prove, that, by the usage of trade in Liverpool, such delivery orders were in the usual form when goods were warehoused in bulk. My Brother *Platt* refused to allow a question to that effect to be put.

If this question had been asked with reference to a purchase of fifty tons of goods, contracted to be sold and delivered simply and not from a warehouse, doubtless it could not be permitted to give evidence, that in usage of trade a transfer or delivery note, authorising the purchaser to receive "*about* fifty tons," would be sufficient.

But if there is a contract to sell and deliver goods in a warehouse, and the keepers of warehouses in that place have a known usage not to accept delivery orders, or transfer notes, as they are called, except in this form, having an objection to make themselves responsible for any particular

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quantity, the delivery of such an order or transfer note may be a sufficient performance of the contract to deliver, in some circumstances. For instance, in the simple case of the contract being to sell a quantity of goods now warehoused in a given warehouse as being "about fifty tons," or in the more complicated case of a sale of "fifty tons weighed by landing scales and now warehoused;" such a form of order would be sufficient, coupled with proof that the goods warehoused were actually of that weight at the landing scales, and it being shewn that the particular order referred to the identical goods so weighed.

Another question raised by Mr. *Hill* was, as to the effect of the alteration by parol of the written contract to deliver the goods on the quay, to be weighed by the landing scales, and substitute a delivery from the warehouse. He contended that this operated as a new contract, embodying all the terms of the old one, except the delivery on the quay by landing weight, and that such new contract was necessarily a waiver or discharge of the old one, and being made before the breach of the old contract, the fourth plea was supported. That plea was, "that, after the making of the agreement, and before breach, the agreement was mutually rescinded by the plaintiff and defendant." We do not think that this plea was proved by this evidence. The parties never meant to rescind the old agreement absolutely, which this plea, we think, imports. If a new *valid* agreement substituted for the old one before breach would have supported the plea, we need not inquire, for the agreement was void, there being neither note in writing, nor part payment, nor delivery, nor acceptance, of part or all. This was decided by the cases of *Stead v. Dawber* (a), and *Marshall v. Lynn* (b).

A further question may arise on the new trial, considering the old contract to be still in force in all its parts, which must be done: for instance, whether the plaintiff on his part declared his option and was ready to give his accept-

(a) 10 A. & E. 57.

(b) 6 M. & W. 109.

ance *in due time*. The delivery from the warehouse instead of the quay not being authorised by the old contract, the only one in force, the sufficiency of the delivery or transfer order cannot now be a question. If the plaintiff had already accepted and received the goods in the warehouse, or even the delivery or transfer order in the form offered, as a performance of the contract on the defendant's part, there would have been a good answer by way of accord and satisfaction; but no such question arises in this case.

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Rule absolute for a new trial.

EDWARD BODGER, Administrator of ELIZABETH BODGER,
deceased, v. ARCH.

July 7.

THE declaration stated that the defendant, on the 19th of January, 1833, and whilst the said Elizabeth Bodger was sole and unmarried, made his promissory note in writing, and delivered the same to her, and thereby promised to pay to her, by her then name of Elizabeth Arch, or order, 246*l.* 12*s.* 6*d.*, with interest for the same from the date thereof. And although the defendant afterwards paid 46*l.* 12*s.* 6*d.*, yet he has not paid

In 1833, the plaintiff married, at which time his wife was the holder of a promissory note made by the defendant, and which had been given to her whilst sole. In 1834 the plaintiff's wife died, after giving

birth to a child. It was then agreed between the plaintiff (who claimed the note as the representative of his late wife,) and the defendant, that the latter should maintain the child, and that in consideration thereof the defendant should receive the rents of certain cottages which had been the property of the plaintiff's wife, and that he should also retain the interest to become payable on the note. In 1839, the defendant signed an indorsement on the note, to the effect, that all interest upon the note was then paid. The defendant continued to maintain the child to the time of its death in 1848. In 1853, letters of administration were granted to the plaintiff; and, subsequently, in the same year, the plaintiff brought the action on the note:—*Held*, per *Alderson*, B., *Platt*, B., and *Martin*, B., (dubitate *Park*, B.), first, that the agreement between the plaintiff and the defendant, that the future maintenance of the child should be taken in part payment of the interest upon the note, and which had been acted upon within six years before action brought, was a sufficient payment of interest within the proviso of the 2nd section of the 9 Geo. 4, c. 14: Secondly, that the contract being with a person acting on behalf of intestate's estate and for its benefit, the administration had relation back to what was done after the death of the intestate and before the grant of letters of administration, so as to entitle the plaintiff to sue as administrator on a promise made to him as such.

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the residue thereof, and the same, with interest, remain due.

Plea: that the alleged cause of action did not accrue within six years before this suit.—Issue thereon.

At the trial, before *Martin*, B., at the Middlesex Sitting in last Hilary Term, the plaintiff was called as a witness, and proved that he married in 1833, and that his wife was the holder of the note in question, which was made by the defendant, who was her brother. She died in the following year, after giving birth to a child. Prior to her death, she requested that the child might be brought up by her sister who lived with the defendant; and after her death, it was agreed between the defendant and the plaintiff (he claiming the note as representing his deceased wife,) that the defendant should keep the child in his house, and incur the expense of its support and maintenance, and should receive therefor in payment the rents of certain cottages which had belonged to the deceased wife, and also retain the interest payable upon the note. In 1839, the plaintiff made on the note an indorsement, which was signed by the defendant, to the effect that all interest upon it was the paid. The defendant continued to keep and maintain the child until its death, which occurred within six years before the commencement of the action. Within that time the defendant also received the rents of the cottages, and always retained the interest upon the note, as provided by the agreement. After the child's death, the defendant promised the plaintiff to give him a new note, but some time afterwards he stated that the Statute of Limitations had run, and he refused to pay the note or give a new one. The plaintiff afterwards took out letters of administration, and in October, 1853, brought the present action.

It was submitted, on behalf of the defendants, first, that the plaintiff could not recover on this declaration, inasmuch as it alleged a promise to the plaintiff's wife while sole, and there was no evidence of such a promise within six years; secondly, that a new promise to the plaintiff before the gran

of administration would not take the case out of the Statute of Limitations, since at that time the plaintiff was not clothed with any legal title to the note; thirdly, that the transaction between the plaintiff and defendant did not amount to a part payment within the meaning of the 9 Geo. 4, c. 14. The learned Judge directed a verdict for the plaintiff, with liberty for him to make any amendment the Court thought proper; and also reserved leave to the defendant to move to enter a nonsuit.

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Watson, in the same Term, obtained a rule nisi accordingly; against which

Willes and *Lush* shewed cause in last Easter Term (May 9).—The plaintiff proposes to amend the declaration by stating a promise to himself as administrator, and there was sufficient evidence of such a promise. First, assuming that the transaction in question amounted to part payment, there was a payment within six years to a person who claimed to be entitled to the note. The plaintiff was in the position of an administrator de son tort, and after the grant of administration he might ratify any act previously done, provided it was for the benefit of the estate: *Morgan v. Thomas* (a), *Thomson v. Harding* (b), *Foster v. Bates* (c). This is not the case of a wrong doer, but that of a party professing to represent the estate of the deceased, and the letters of administration, when taken out, would have relation back, so as to give effect to the payment. Suppose, that before administration the defendant had paid to the plaintiff a sum of money on account of the note, and that after administration the plaintiff had sued the defendant for the whole, could not that payment have been pleaded in bar? There must always be some interval during which the estate of a

(a) 8 Exch. 302.

(b) 2 E. & B. 630.

(c) 12 M. & W. 226.

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deceased is unrepresented. *Clark v. Hooper* (a) is an express authority that this payment is good. There, the payment of interest on a promissory note was made to a person who assumed to act as administrator, but who had, in fact, no title to receive it, and that was held a sufficient acknowledgment of the debt to defeat the Statute of Limitations.

Secondly: the agreement that the maintenance of the child should be defrayed by the interest on the note, when acted on, amounted to part payment within the 9 Geo. 4, c. 14. Payment need not necessarily be in money, but any settlement of account which the parties may agree to treat as equivalent to payment in money is sufficient: *Hart v. Nash* (b), *Ashby v. James* (c). Here, the money expended by the defendant from day to day in the maintenance of the child, was a payment of so much interest on the note. The transaction was the same as if the defendant had paid the interest to the plaintiff, and he had returned it to the defendant for the maintenance of the child.

Watson, Ogle, and Bullar, in support of the rule (June 6).—First, assuming that the agreement between these parties and the acts done in pursuance of it amount to payment of the interest on the note, there was no evidence to support the amended declaration, laying a promise to the plaintiff as administrator. The promise was made to the plaintiff in his personal character only. The doctrine of relation has no application here. All acts that are capable of being ratified after letters of administration have been taken out, must be such as are for the benefit of the estate: *Morgan v. Thomas* (d). The case of *Foster v. Bates* (e) proceeded upon the necessity of the existence of such relation for the benefit of the estate. This agreement, and the acts relied upon by the plaintiff, did not confer any

(a) 10 Bing. 480.

(b) 2 C. M. & R. 337.

(c) 11 M. & W. 542.

(d) 8 Exch. 302.

(e) 12 M. & W. 226.

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benefit on the estate. According to the well-known principle, "the law will never make any fiction, but for necessity, and in avoidance of a mischief" (a). And further, the plaintiff has been guilty of laches by not taking out letters of administration sooner, and by having permitted so many years to pass away without having done so. The office of administrator originated in the 31 Edw. 3, st. 1, c. 11, which shews that the benefit of the estate is the main object to be regarded. The 55 Geo. 3, c. 184, s. 37 inflicts a severe penalty upon a person in any manner administering the property of an intestate without taking out letters of administration within six months after the intestate's death; and according to the principle laid down by Lord Holt, C. J., in *Bartlett v. Vinor* (b), and recognised by the Court in *Cope v. Rowlands* (c), "a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because a penalty implies a prohibition." [Parke, B.—You must look to the object of that statute: The 37th section merely inflicts a penalty upon an executor or administrator personally, for not proving the will or taking out letters of administration within a certain specified time. But it was not intended that the representatives of the deceased should thereby be prevented from taking out probate or letters of administration after that time. The sole object of that statute is to secure the payment of the duty to the revenue.]

Secondly: there was no such evidence of payment of interest upon the note as is sufficient to take the case out of the Statute of Limitations. There was no payment in part, for no money passed between the parties. Now, in order to take the case out of the statute, the payment must be made under circumstances which will warrant a jury in inferring a promise to pay the residue: *Wainman v. Kynman* (d). The alleged payments, taken as such, would not justify the inference of an absolute promise to pay, as the promise

(a) 3 Rep. 30 a.

(c) 2 M. & W. 149.

(b) Carth. 252.

(d) 1 Exch. 118.

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would depend upon a contingency, viz. upon the plaintiff taking out letters of administration. In *Clark v. Hooper* (a) which has been relied upon by the plaintiff, payment had actually been made, and it was also made to the plaintiff, who had taken out letters of administration, although in the wrong diocese. If constructive payment is to be held sufficient to take a case out of the statute, much of that mischief which the statute was framed to obviate will be revived, for a parol acknowledgment of such part payment within six years before action brought will take a case out of the statute: *Cleave v. Jones* (b). This part of the subject was much considered in *Tanner v. Smart* (c). The recent cases of *Forsyth v. Bristowe* (d) and *Howcutt v. Bonser* (e), although decisions upon a different point, may nevertheless be referred to as bearing on the question. But, even if a promise to pay the residue of the debt could be inferred from the facts, it would be difficult to say at what precise period of time that promise was made. The agreement could not be relied on, for it was made more than six years before the commencement of the suit; and if the necessities furnished under the agreement are relied on, the objection is that they were not supplied to the plaintiff or his agent.—They also cited *Murray v. East India Company* (f).

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case, which was tried before my Brother *Martin*, the declaration was on a promissory note made to the plaintiff's wife, before marriage, in 1833, and the promise to pay her was stated to have been whilst she was sole.

(a) 10 Bing. 480; 4 Moo. & Sc.
353, *S. C.*
(b) 6 Exch. 573.
(c) 6 B. & C. 603.

(d) 8 Exch. 716.
(e) 3 Exch. 491.
(f) 5 B. & Ald. 204.

It appeared that she died in 1834, when the plaintiff, her husband, took upon himself the management of her affairs, before he obtained letters of administration, and made an agreement with the defendant that he should keep a child of the plaintiff's, and for the keep should retain the interest of his promissory note, and also receive the rents of some cottages which had belonged to the wife. In 1839, the plaintiff and defendant settled accounts, and then they signed on the back of the note an acknowledgment that all interest was paid on the note up to that date. In 1848, the child died. In 1853, the plaintiff took out administration. My Brother *Martin* directed a verdict for the plaintiff, reserving liberty to move to enter a nonsuit, and also to amend, if the Court thought fit.

There is no doubt that a promise to pay the plaintiff's wife whilst sole, and within six years, was not proved, and could not be, for she died in 1834, and consequently a nonsuit ought to be entered, unless an amendment could be made, by stating a promise which the evidence would support. The plaintiff then proposes to amend, by stating a promise to himself as administrator.

The only question then is, whether the evidence proves that promise. Suppose an actual promise to have been made to the plaintiff before he was administrator, and within six years, either in writing or accompanied by a part payment of principal or interest, we have no doubt the action would have been maintainable. It would have constituted a new contract with the plaintiff as administrator, founded on the consideration of the old debt; and this is the true nature of every case which is said to be taken out of the operation of the statute by a new promise; and this being a contract with a person acting on behalf of the intestate's estate, and not on his own account, the administration would have relation back in order not to lose the benefit of that contract, upon the same principle that an action of trover is maintainable for a conversion of goods of an intestate after his death and

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before the grant of administration, and that an action of assumpsit by an administrator as such will lie on a contract of sale of goods of the intestate by a person meaning to act as agent for the benefit of the estate between the death and grant of administration: *Foster v. Bates* (a). The case of *Clark v. Hooper* (b) is to the same effect.

But in order to constitute a new contract, the acknowledgment or promise must be in writing, signed, by 9 Geo. 4, c. 14, or there must be a payment of part or the whole of the interest as such, or part payment of the principal of the debt sued for, due from the person paying to him to whom it was made. It must, in order to fall within the exception of that statute, be a payment which implies an acknowledgment, and consequently a promise to pay the whole debt to the plaintiff; and the reason why the effect of such payment is not lessened by the Act, is, that it is not a mere acknowledgment by words, but it is coupled with a fact: *Waters v. Tompkins* (c), *Wainman v. Kynman* (d). This part payment need not be in money, but in any mode which the parties agree shall be treated as equivalent to a payment in money. Therefore, the settlement of accounts in 1839, whereby it was agreed between the plaintiff and defendant that the interest up to that time should be considered as paid and discharged, is such a payment as took the case out of the statute, that is, constituted a fresh contract to pay in consideration of the original debt. Since that time, there has been no settlement of accounts, and the question is, whether, as the agreement was then made, or rather continued, that for the future the maintenance of the child should be paid for in part by the interest of the note, or correlative, that the interest of the note should be paid by maintenance of the child, and that agreement has since been acted upon, there can be considered to have been a part pay-

(a) 12 M. & W. 226.

(b) 10 Bing. 480.

(c) 2 C. M. & R. 723.

(d) 1 Exch. 118.

ment to take the case out of the statute ; in other words, a fresh contract by the defendant to pay in consideration of the old debt. My Brethren are all of opinion, that the maintenance of the child, part of which took place within six years before the commencement of the suit, being the agreed mode of payment of interest, was a payment within the meaning of the exception in the 9 Geo. 4, and consequently there must be a verdict for the plaintiff on the amended declaration.

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I must say, however, that I greatly doubt whether such a payment as this does amount to a new promise, founded on the old consideration, so as to make the defendant liable. If so, there would be a perpetual series of new contracts in consideration of the old debt, *de die in diem*, by every supply of food or raiment to the child, none of them made to the plaintiff or his agent, none implying an acknowledgment to him of the principal money being still due, and a consequent promise to pay it to him. I should have thought a payment to revive the old debt, must be a payment to the plaintiff or his agent, accompanied by an express promise to pay him the principal, or an acknowledgment to the plaintiff from which such a promise could be implied. To permit the benefit of the Statute of Limitations to be defeated by such constructive payments, would be a step to letting in the mischief which prevailed before the statute, when the most trifling circumstances had been held sufficient to render the defendant liable to an old debt, to such an extent that the practice was really a disgrace to the administration of justice.

The rule must be absolute to amend, and the plaintiff is to have a verdict ; but the defendant is not to pay any costs of the rule or trial.

MARTIN, B., said—My opinion is, that any facts which would prove a plea of payment of interest in the event of an action being brought to recover it, would be a payment sufficient to bar the statute.

Rule absolute.

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BULL v. ROBISON.

Where a manufacturer contracts to deliver a manufactured article at a distant place, and the article, when delivered to the carrier for the purpose of being conveyed, is of a merchantable quality, the purchaser is bound to accept it, if only deteriorated to the extent that it is necessarily subject to in its course of transit from the one place to the other.

THE first count of the declaration stated that the plaintiff agreed with the defendant to manufacture for him certain goods, and to deliver them to him at a certain place; and that, although the plaintiff manufactured the goods and tendered them at the place in question, the defendant refused to accept them.

The defendant pleaded, secondly, that the plaintiff was not ready or willing to deliver at the place so agreed upon as the place of delivery goods of the qualities, quantities, and descriptions contracted for.

And, thirdly, that the said contract was made subject to an implied warranty on the part of the plaintiff, that the plaintiff would deliver the said goods in merchantable condition; and that, at the time when he was so ready and willing to deliver the same, they were not in merchantable condition. Wherefore the defendant refused to accept and pay for the same.—Upon these pleas issues were joined.

At the trial, before *Platt*, B., at the last Liverpool Assizes, the following facts appeared:—The plaintiff was an iron manufacturer in Staffordshire, and the defendant a merchant in Liverpool; and in December last a contract was entered into between them for the manufacture by the plaintiff, and sale to the defendant, of a large quantity of hoop-iron. The iron was to be manufactured in Staffordshire, and delivered by the plaintiff to the defendant in Liverpool, in the months of January and February last; and it was understood by both parties that it was to be forwarded by a canal boat to Ellesmere port, and there put on board vessels which navigate the Mersey, which were to be provided by the defendant, and so brought on to Liverpool and there delivered to him. It was proved that the iron was properly manufactured, and

was perfectly clean and bright when put on board the canal boats in Staffordshire; but a very considerable delay took place in the passage to Ellesmere port, in consequence of the frost, and the boats were obliged to stop for some weeks at Middlewich, and upon their arrival at Ellesmere port the iron was much rusted. It was then forwarded to Liverpool, and upon its arrival was tendered to the defendant as in fulfilment of the contract. He refused to accept it, alleging that it was not in merchantable condition; and this action was brought to recover damages by reason of such non-acceptance. A considerable body of evidence was given on both sides.

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The learned Baron told the jury, that, the contract being for hoop-iron, to be manufactured by the plaintiff and delivered by him at Liverpool, the defendant (the vendee) was entitled to have it delivered to him at Liverpool in merchantable condition; but it having appeared by the evidence, that all such iron, in the course of the transit from Staffordshire to Liverpool at that period of the year, sweats, (as it is called,) and suffers thereby some deterioration in its brightness and appearance, the counsel for the plaintiff called the attention of the learned Judge to this circumstance, and requested him to state to the jury that the plaintiff might satisfy his contract by tendering for acceptance by the defendant iron so necessarily deteriorated. The learned Judge, however, declined to do so, and left the question to the jury, whether the iron was merchantable when tendered at Liverpool, without reference to any such deterioration. The jury, with this direction, found that it was *not merchantable* either at Liverpool or Ellesmere, and gave their verdict for the defendant.

Watson obtained a rule nisi for a new trial on the ground of misdirection, in last Easter Term.

In the present Sittings (June 22),

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Hugh Hill and *Milward* shewed cause.—Where a manufacturer contracts to deliver an article at a distant place, he impliedly warrants that the article shall be delivered in a merchantable condition. In *Smith on Mercantile Law*, 4th edit. p. 461, it is said: "In every contract to furnish manufactured goods, a warranty is implied that they shall be of a merchantable quality: *Laing v. Fidgeon* (a).—The ruling of Lord *Ellenborough*, C. J., in *Gardiner v. Gray* (b), is to the same effect. [*Alderson*, B.—These goods were of a merchantable quality when first put on board the boat to be carried to Liverpool; but in the course of the transit, from the ordinary contingencies of the voyage, some of the bloom was taken off them; who is to bear that risk?] The vendor contracts to deliver the goods at a particular place. He, therefore, and not the purchaser, ought to be subject to any such loss. The delivery of the goods to the carrier does not necessarily vest the property in them in the vendee: *Dunlop v. Lambert* (c). It is reasonable that the warranty should attach at the place where the contract goods are to be delivered to and where they are to become the property of the vendee. [*Martin*, B.—Take the case of a contract to deliver certain English manufactures at New York: it would not be reasonable to say that they must be delivered there precisely in the same state as that in which they were when first put on board.] The vendor would have to bear the extraordinary contingencies of the transit, and upon the same principle he ought to bear the ordinary ones also.

Watson and *Jones* in support of the rule.—It is conceded that the vendor takes the risk of the extraordinary contingencies of the transit, but not those which necessarily follow from the circumstance that the conveyance takes place at a particular season of the year. If these goods

(a) 6 Taunt. 108.

(b) 4 Camp. 144.

(c) 6 Cl. & F. 600.

had been sent by rail in the ordinary way, the damage would not have occurred; but, inasmuch as the damage was occasioned by their being sent by this particular mode of conveyance at the special request of the vendee, it is only reasonable that the loss should fall upon him.

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The judgment of the Court was now delivered by

ALDERSON, B.—This was an action to recover damages for the refusal to accept certain hoop-iron, which was tendered to the defendant by the plaintiff, in alleged fulfilment of a contract between them. [His Lordship, after stating the facts as hereinbefore set forth, proceeded]

A rule was obtained for a new trial, which has been argued before us, and we think it must be made absolute.

There is no express warranty in the case, there is only that which is implied by law. Now, we have no doubt that the plaintiff was bound to manufacture merchantable hoop-iron; this, however, he did. We have no doubt, also, that he was bound to deliver the hoop-iron at Liverpool in a certain state and condition; but we think that hoop-iron, to be manufactured in Staffordshire, and to be forwarded by canal and river, to be delivered in Liverpool, must be accepted by the vendee, if only so far deteriorated as all such iron must necessarily be deteriorated in its transit from Staffordshire to Liverpool. The law, we think, could never imply a warranty that the iron should be delivered in Liverpool, free from a deterioration without which iron well manufactured in Staffordshire could not be transferred from Staffordshire to Liverpool. Any warranty implied by the law must be a reasonable warranty, and cannot be one which it is physically impossible to comply with.

If a man make an express contract to deliver at Liverpool hoop-iron in the very same condition as when first manufactured in Staffordshire, he must, of course, bear the con-

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sequence of his own unwise bargain; but we think there is no such contract implied in such a transaction as the present. We have no doubt that iron, and numerous other articles of manufacture in this country, are frequently manufactured upon orders from abroad, and to be delivered there by the manufacturer. In such cases, to hold that the vendor, in the absence of an express warranty, was to be subjected to the risk arising from the necessary deterioration which every such voyage must produce upon the article, would, as it seems to us, lead to unjust consequences.

A manufacturer who contracts to deliver a manufactured article at a distant place must, indeed, stand the risk of any extraordinary or unusual deterioration; but we think that the vendee is bound to accept the article, if only deteriorated to the extent that it is necessarily subject to in its course of transit from the one place to the other, or, in other words, that he is subject to and must bear the risk of the deterioration necessarily consequent upon the transmission.

In our opinion, therefore, the plaintiff was, in strict law, entitled to have this direction given to the jury. We cannot help thinking, however, that, in all probability, upon the facts as stated in the note of the learned Judge, the result would have been the same.

Rule absolute.

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BENTLEY v. DAWES.

July 7.

IN this case, the defendant had demurred to the declaration, in addition to pleading several pleas, upon which issues were joined. An application was then made to *Maule*, J., to change the venue from Cheshire to Middlesex, when his Lordship made the following order:—

“Upon hearing the attornies, &c., I do order that the venue be changed to Middlesex; that the costs to set aside the demurrer and to amend and change the venue abide the result of the demurrer; that the defendant shall, within seven days, pay 60*l.* into Court, and shall pay the costs of the day, if any, to be taxed.—March 31, 1854.”

The sum of 60*l.* was accordingly paid into Court. On the argument of the demurrer, judgment was given in favour of the plaintiff^(a), and the usual entry was made, postponing final judgment till the decision of the issues in fact. When the cause came on for trial before *Parke*, B., a defect was found in the pleadings, and the learned Judge, being of opinion that he was not justified in allowing an amendment, recommended the withdrawal of a juror. To this course the parties assented, and the usual entry was made upon the *postea*, that no further action should be brought. Under these circumstances, an application was made to *Parke*, B., at Chambers, on the part of the defendant, for leave to take the sum of 60*l.* out of Court. The learned Judge was of opinion, that, under the 3 & 4 Will. 4, c. 42, s. 34, the plaintiff was entitled to the costs of the demurrer, in addition to certain other costs, to which the defendant did not dispute that the plaintiff was entitled. His Lordship made an order accordingly.

Under the 3 & 4 Will. 4, c. 42, s. 34, the successful party on a demurrer is entitled to his costs in that behalf, whatever may be the ultimate determination of the cause.

T. Jones obtained a rule, calling on the plaintiff to shew

(a) 9 Exch. 666.

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cause why the sum of 60*l.* should not be paid to the defendant or his attorney, after deducting therefrom the costs of the application to set aside the demurrer and to amend and change the venue, and the costs of the day at the Chester Assizes (if any), and why the order of *Parke*, B., should not be rescinded or varied accordingly.

Milward shewed cause (June 15).—The plaintiff's right to the costs of the demurrer, which was decided in his favour, is vested in him by the express language of the 34th sect. of the 3 & 4 Will. 4, c. 42, and the disposal of the issues in fact did not affect that right. The 34th sect. enacts that, "in all writs of scire facias, the plaintiff obtaining judgment on an award of execution shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded or demurrer joined; and that, where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given, shall also have judgment to recover his costs in that behalf." This enactment was followed by the 81st sect. of the Common Law Procedure Act, 15 & 16 Vict. c. 76, which provides that "the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues." And by Reg. Gen., H. T. 1853, rule 62, "when issues in law and fact are raised, the costs of the several issues, both in law and fact, will follow the finding or judgment, and if the party entitled to the general costs of the cause obtain a verdict on any material issue, he will also be entitled to the general costs of the trial; but if no material issue in fact be found for the party otherwise entitled to the general costs of the cause, the costs of the trial shall be allowed to the opposite party." In the present case, the dispute on the issue in law was at an end at the trial, when

the issues in fact were also disposed of by the withdrawal of a juror. What, then, is the effect of withdrawing a juror? In *Harries v. Thomas* (a), Lord Abinger, C. B., said—"I entirely agree that the mere withdrawal of a juror does not of necessity put an end to the cause. A juror may be withdrawn merely for the accommodation of both parties, it being found convenient not to try the cause, although, the jury having been sworn, the record cannot be withdrawn. It depends entirely on the circumstances under which the agreement was come to; if it appears that it was the intention of the parties to put an end to the cause, for obtaining a particular advantage or avoiding a particular loss, the Court will give effect to it, or, under some circumstances, even preclude the plaintiff from bringing another action." [Platt, B.—Have not the parties, by the agreement to withdraw a juror, put an end to the whole cause, including the judgment on the demurrer? They have thereby agreed to be placed in statu quo. The defendant could not bring a writ of error upon the judgment on the demurrer.] The case of *The Mayor of Macclesfield v. Gee* (b) is an authority, that a writ of error may be brought upon a judgment for the plaintiff on demurrer, notwithstanding a subsequent discontinuance under the rule of H. T. 2 Will. 4, r. 106. The fact of a discontinuance is even stronger than that of the withdrawal of a juror. In *Elwood v. Bullock* (c), after issues had been joined in law and fact, and the plaintiff, having judgment for him upon the issues in law, the issues in fact being untried, obtained a rule to discontinue on payment of costs, and it was held that the plaintiff was entitled to his costs on the demurrer notwithstanding the discontinuance. *Scott v. De Richebourg* (d) may be referred to; and also the usual form of the postea on a juror being withdrawn, Chitty's Forms, edit. 1840, p. 78. [Parke, B.—

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(a) 2 M. & W. 32.

(c) 6 Q. B. 383.

(b) 13 M. & W. 470.

(d) 11 C. B. 447.

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When this matter was before me at Chambers, the defendant's counsel relied upon *Burdon v. Flower* (a), in which, the plaintiff having succeeded on a demurrer, and a juror having been withdrawn, my Brother *Coleridge* refused to allow the plaintiff the costs of the demurrer. The learned Judge there said—"The parties having withdrawn a juror, it is the same as if no trial at all had taken place. Either the plaintiff or the defendant may go down to trial again. If the defendant should succeed at the trial on the issues in fact raised on this record, he would have the costs of those issues to set off against the costs of the demurrer." But that case is clearly distinguishable from the present, as the parties here agreed that the cause should be terminated.] If the defendant does, in truth, intend to bring a writ of error upon the judgment on the demurrer, the money ought to remain in Court.

T. Jones in support of the rule.—The parties, by their agreement at the trial to withdraw a juror, relieved the jury from giving any opinion upon the issues in fact, and upon the assessment of the damages. The plaintiff's construction of the 3 & 4 Will. 4, c. 42, s. 34, in effect repeals the Statute of Gloucester, for the plaintiff would have judgment for costs in a case where there are no damages. There must be a judgment to enable the plaintiff to have his costs: *Partridge v. Gardner* (b). As to the effect of the withdrawal of a juror, in *Gibbs v. Ralph* (c), *Pollock*, C. B., said—"It must be taken as a positive rule of practice, that when the parties to a cause agree to withdraw a juror, that puts a final end to the litigation between them, and no future action can be brought for the same cause;" and *Alderson*, B., said, "I have always understood it to be perfectly clear, that the withdrawal of a juror puts an end to the cause;" and the Court there stayed an action brought

(a) 7 Dowl. 786.

(b) 4 Exch. 303.

(c) 14 M. & W. 804.

for the same cause. If that be so, as a matter of practice, these proceedings are wholly at an end. [Parke, B.—In the case relied upon, *Harries v. Thomas* and the other authorities were not cited.] Then, according to the intention of the parties to the arrangement at the trial, it is clear that the defendant never imagined that he should have to pay these costs; and, indeed, the defendant would be guilty of a breach of that agreement, if he were to bring a writ of error, after having consented to the arrangement that no further proceedings in the matter should be taken.

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PARKE, B., now said:—(after stating the facts his Lordship proceeded:)—Under these circumstances, the question is, whether the plaintiff is entitled to have the costs of the demurrer upon which he has succeeded. We have considered the question; and although my Brother *Platt* is not, I believe, fully satisfied upon the point, the rest of the Court are of opinion, that, under the statute 3 & 4 Will. 4, c. 42, s. 34, which gives to the successful party upon a demurrer his costs of that demurrer, the plaintiff has a right to these costs quite irrespective of the termination of the suit, and independently of the assessment of damages. The words of the statute are, that “he shall have judgment to recover his costs in that behalf.” That right, therefore, is not affected by the ultimate determination of the suit.

The only remaining point is, whether the arrangement which took place before me at Nisi Prius is to be considered as a waiver on the part of the plaintiff of his title to the costs, to which he would otherwise be clearly entitled. That is a matter to be decided by me rather than by the Court. I am of opinion that it was not such a waiver, but that it was merely an agreement that the suit, as a cause to be tried, should be determined. As we all concur, my order will stand; and this rule must be discharged.

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Milward then applied for costs; but the Court said, that, as the point was novel, the rule would be discharged without costs.

Rule discharged, without costs.

June 22. STEVENS v. THE MIDLAND COUNTIES RAILWAY COMPANY and LANDER.

Quære, whether an action for a malicious prosecution will lie against a corporation aggregate!—
Per *Alderson, B.*, that it will not.

THIS was an action against the defendants for having maliciously, and without reasonable or probable cause, prosecuted the plaintiff on a charge of having feloniously received a piece of tarpauling, the property of the company. The defendants pleaded not guilty, upon which issue was joined.

At the trial, before *Russell Gurney, Esq.*, at the last Gloucester Assizes, it appeared that several tarpaulings, the property of the defendants (an incorporated company) having been lost, the defendant Lander, who acted as the company's superintendent at Derby, made inquiries upon the subject, and having found a small piece of tarpauling on the premises of the plaintiff, who was a grocer at Cheltenham, inquired of him how he had obtained it. The plaintiff replied, that he had received it from a man named Birmingham, a carrier in the service of the company, who had given it to him about two years before, for the purpose of covering some sugar casks which Birmingham had brought from the station, saying, at the time, that the tarpauling was of no use to the company. This tarpauling, which was about a square yard only, had some of the company's letters upon it, which had not been obliterated, and the plaintiff had never made any attempt to conceal it, but had used it on several occasions to cover goods which he was carrying in his cart to the railway station. Birmingham was charged

with the larceny of the tarpauling, and the plaintiff was called as a witness, but the grand jury threw out the bill. Lander then applied for a warrant against the plaintiff for having feloniously received it. This was refused; but he renewed his application, as he said, "to punish some one, in order to deter others from committing similar depredations." He at last obtained a warrant, and he then applied to a police constable at night to arrest the plaintiff. This the constable objected to do, on account of the lateness of the hour and the respectability of the plaintiff; to which Lander replied, that he would drag the plaintiff out of his bed. At the Assizes, a bill was found against the plaintiff, and the prosecution was conducted by the attorney of the company; but the learned Judge, on hearing part of the case, stopped it, and refused to allow any costs. Under these circumstances, it was contended, on the part of the defendants, that an action for a malicious prosecution would not lie against a corporation; and consequently, that, at all events, the railway company were not liable. The learned Judge reserved leave to the defendants to move to enter a verdict for them, and left the case to the jury, who found a verdict for the plaintiff, with 100*l.* damages.

Keating obtained a rule nisi, in pursuance of the leave reserved, or for a new trial on the ground of misdirection.

Whateley and *Gray* shewed cause.—First, as against Lander, there was abundant evidence that he acted maliciously, and without reasonable and probable cause, in the prosecution against the plaintiff; and consequently, as regards this defendant, the rule cannot be supported.

Secondly, with respect to the question whether the action will lie against the company, although there is no decision precisely in point, still the principle of the authorities favours the view that it does lie. [*Alderson*, B.—

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How can it be said that a corporation is liable upon a charge of doing an act *malo animo*, when a corporation has no *animus*? I do not say, that the directors of the company may not be individually liable, if they knowingly and maliciously direct the prosecution of an innocent person. But they are not invested by the company with any such authority.] A corporation is liable in trespass for an assault committed by their servant with their authority *Eastern Counties Railway Company v. Broom* (a); although not criminaliter, as was observed by *Maule, J.*, on the argument of that case. *Chilton v. London and Croydon Railway Company* (b) was also an action of trespass against the company for an assault. And a corporation aggregate may be indicted for a misfeasance: *Reg. v. Great Northern Railway Company* (c). Lord Denman, C. J. in delivering the judgment of the Court, says, "Some dicta occur in old cases, 'a corporation cannot be guilty of treason or of felony.' It might be added, 'of perjury or offences against the person.' The Court of Common Pleas lately held, that a corporation might be sued in trespass (d), but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which as such has no such duties, cannot be guilty in these cases; but they may be guilty, as a body corporate, of commanding acts to be done to the nuisance of the community at large. The late case of *Reg. v. Birmingham and Gloucester Railway Company* (e) was confined to the state of things then before the Court which amounted to nonfeasance only, but was by no means intended to deny the liability of a corporation for

(a) 6 Exch. 314.

(b) 16 M. & W. 212.

(c) 9 Q. B. 315.

(d) *Maund v. Monmouthshire Canal Company*, 4 M. & Gr. 45.

(e) 3 Q. B. 223.

misfeasance." [Platt, B.—There are many matters which would not form the ground of action against a corporation. It could hardly be said that an action for breach of promise of marriage would lie against a corporation aggregate. Alderson, B.—And, moreover, there is no evidence that this company authorised Lander to act *unlawfully* in the matter.] This is rather a question of curious investigation than of importance.—They also cited *Sears v. Lyons* (a) and *Merest v. Harvey* (b).

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Keating, Huddleston, and Powell, in support of the rule.—The defendant Lander acted as the agent of the company, and as such he is joined with them in this action. If, then, this defendant acted merely under the orders of the company, although without reasonable and probable cause, he would not be liable, unless it were also shewn that he was personally actuated by malicious motives. For although malice may be inferred from want of reasonable and probable cause, still the question of malice ought to be left to the jury: *Mitchell v. Jenkins* (c). In *Bromage v. Prosser* (d), *Bayley, J.*, says, " 'Malice,' in common acceptance, means ill-will against a person; but, in its legal sense, it means a wrongful act done intentionally, without just cause or excuse." There was no evidence of such malice, and the learned Judge should so have directed the jury.

ALDERSON, B.—The question arising on the rule, so far as it affects the defendant Lander, is not whether this is a verdict against evidence, but whether there was evidence for the jury that the act done by him was done without reasonable and probable cause and maliciously. I think that there was abundant evidence. [His Lordship commented on the facts and proceeded:] The jury might well infer from

(a) 2 Stark. 317.

(b) 1 Marsh. 139.

(c) 5 B. & Ad. 588.

(d) 4 B. & C. 255.

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the expressions used by the defendant, that he had some personal spleen against the plaintiff. Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice, is a malicious motive on the part of the person who acts in that way. And it appears to me in the present case, that the prosecution of a person for the purpose of frightening others, and thereby deterring them from committing depredations upon the property of the company, is not a motive of such a direct character as to afford a legitimate foundation for a criminal prosecution. I therefore think, that, as against Lander, there was abundant evidence of malice to support the action.

With respect to the other part of the rule, it seems to me that an action of this description does not lie against a corporation aggregate; for, in order to support the action, it must be shewn that the defendant was actuated by a motive in his mind, and a corporation has no mind.

PLATT, B.—I am of opinion that there is no evidence against this corporation. But I do not say that a case might not arise, in which a motive might be assigned upon which the action could be maintained. The company are not responsible by reason of the person acting as their solicitor having attended at the trial of the prosecution. It was not shewn that the company had given directions for this particular proceeding, and Lander was merely one of their servants. Then, as to the question against him, I think there was ample evidence. [His Lordship stated the facts.] With respect to the argument of principal and agent: if A. orders B. to conduct a prosecution, and both know that the party charged is innocent, A and B. are equally to blame. The fact of B. obeying A.'s command is not enough to exonerate him if he acts as the defendant Lander here acted. This is an answer to that argument, which is a very weak one, that the company are not responsible, as they have no motive; and that their servant is not

responsible, because he was ordered by them to do the act; so that, if that argument were to hold good, no one would be responsible for a scandalous act of this description.

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MARTIN, B.—Lander, who assumed the whole control of the prosecution, must be treated as a principal. There is no evidence that he was acting otherwise than on his own account. [His Lordship, after commenting on the facts, proceeded:] I think that the fact of the defendant Lander prosecuting the plaintiff, not for the purpose of punishing him, but to make him an example to others, is ample evidence of malice.

I think it unnecessary to give any opinion upon the question, whether this form of action would lie against a corporation. In the present case, if Lander had been the servant of a private individual, or of a trading copartnership, his masters would not have been liable. The rule, therefore, must be absolute to enter a verdict for the company, but discharged as to Lander.

Rule accordingly.

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In an action against a magistrate for having, in the execution of his office, acted maliciously and without reasonable and probable cause, he is entitled to notice of action as required by the 11 & 12 Vict. c. 44, s. 9. In such case, the question whether he acted *bonâ fide*, or used his office colourably, does not arise.

THE first count of the declaration was for assaulting the plaintiff, giving him in custody to a constable, and causing him to be imprisoned and kept to hard labour in the house of correction at Beverley. The second count stated, that the defendant, being the owner of a duck which the plaintiff had unwittingly killed, and being anxious to punish the plaintiff for so killing the said duck, maliciously caused and instigated one John Blenkin to make a complaint upon oath to him, the defendant, as one of her Majesty's justices of the peace for the East Riding of the county of York, that the plaintiff had, as his hired servant in his the said John Blenkin's said service, been guilty of divers misdemeanours, miscarriages, and ill behaviour towards him the said John Blenkin, and the said defendant maliciously convicted him the plaintiff of the said offences, and wilfully and maliciously and without just cause issued his warrant of commitment, whereby he commanded the constable of Bridlington, in the said East Riding to convey the said plaintiff to the said house of correction at Beverley; and also commanded the keeper of the said house of correction to receive the plaintiff into his custody in the said house of correction, there to remain and be corrected and be kept to hard labour for the space of twenty-one days from the date of the said commitment and the defendant, for the furtherance of the said malicious desire, wrote a letter to the gaoler of the said house of correction at Beverley, ordering him to flog the plaintiff severely: by means of which said several premises the plaintiff has been greatly injured, and has suffered damages.

Plea: Not guilty by statute, and issue thereon. The following statutes were marked in the margin of the plea 11 & 12 Vict. c. 44; and 20 Geo. 2, c. 19.

At the trial, before *Cresswell*, J., at the last York Assizes, it appeared that the plaintiff was a boy about fourteen years of age, and in the service of one Blenkin, by whom this action was brought as his next friend. The plaintiff was examined as a witness, and stated, that, on a certain occasion whilst passing a pond of the defendant, he had killed one of his ducks, and which he stated he believed to be a wild duck. Shortly afterwards his master, at the instigation of the defendant, took the plaintiff before him on a charge of disobedience of his master's orders; when the defendant said, that as his master had frequently on previous occasions told the plaintiff not to meddle with the defendant's ducks, he should send him to prison for having disobeyed his master's orders, and not for having killed this duck. The plaintiff denied that he had ever received any such orders from his master. The defendant, however, convicted the plaintiff under 20 Geo. 2, c. 19, s. 2, which empowers justices of the peace to punish servants for misdemeanours, miscarriages, and ill behaviour in their masters' service, and he drew up a commitment in the following form:—

“East Riding
of the county
of York. } “To the constable of Bridlington in the
said Riding, and to the keeper of the house
of correction at Beverley, in the said Riding.

Whereas information and complaint hath been made unto me, one of her Majesty's justices of the peace in and for the said Riding, upon the oath of John Blenkin, farmer, of Boynton in the said Riding, that John Kirby, of Bridlington, his hired servant, hath in his said service been guilty of divers misdemeanours, miscarriages, and ill behaviour towards him the said John Blenkin, and particularly by neglect and disobedience of orders on the 2nd instant, as well as on many other occasions; and whereas, in pursuance of the statute in that case made and provided, I have duly examined the proofs and allegations of both the said parties touching the matter of the said complaint; and,

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upon due consideration had thereof, have adjudged and determined that the said John Kirby hath in his service aforesaid been guilty of divers misdemeanours, miscarriages and ill behaviour towards him the said John Blenkin, and particularly by neglect of duty and disobedience of order on the 2nd instant, as well as on sundry other occasions: I do, therefore, convict him of the said offence, in pursuance of the statutes in that case made and provided. These are therefore to command you, the said constable, forthwith to convey the said John Kirby to the said house of correction at Beverley aforesaid, and to deliver him to the keeper thereof with this warrant. And I do hereby command you the said keeper, to receive the said John Kirby into your custody in the said house of correction, there to remain *and be corrected* and held to hard labour for the space of twenty-one days from the date hereof; and for your so doing this shall be your sufficient warrant.

"Given under my hand and seal, June 8, A. D. 1853.

"F. SIMPSON," (Ls).

On the plaintiff's arriving at the prison, the governor wrote to the defendant requesting to know what was intended by the words "to be corrected" in the form which were unusual. The defendant wrote in reply, that the plaintiff was to be flogged, as he had received several complaints from the plaintiff's master of him. The plaintiff was accordingly flogged. The plaintiff's attorney deposed, that, in a conversation with the defendant, the latter stated that he had done what he did for the boy's good and that he had further said, that, unless the attorney would promise not to bring an action against him, he would get the boy committed to prison again for killing the duck.

At the close of the plaintiff's case, it was contended on the part of the defendant, that he was entitled to notice of action under the 9th section of the 11 & 12 Vict. c. 44 and that, as no notice had been given, the plaintiff must be

nonsuited. On the part of the plaintiff it was contended, that there was evidence that the defendant had used his office colorably, and that the question whether the defendant was entitled to notice depended upon his having done what he did in the bona fide belief that he was acting as a magistrate, which was a question for the jury. The learned Judge, however, thought that the defendant was entitled to notice, and that there was no such question for the jury. He accordingly nonsuited the plaintiff, reserving leave to him to move to set aside the nonsuit, and enter a verdict.

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In Easter Term, *E. V. Price* obtained a rule nisi accordingly, or for a new trial, on the ground of misdirection.

P. Thompson shewed cause.—A magistrate who acts wrongfully in the execution of his office is entitled to notice of action, under the 9th section of the 11 & 12 Vict. c. 44. And notice is necessary, although he acts *malâ fide* in such case, for the question of bona fides does not arise. The 1st section of the 11 & 12 Vict. c. 44, after reciting that it is expedient to protect justices of the peace in the execution of their duty, enacts, that “every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged, that such act was done *maliciously* and without reasonable and probable cause; and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit or a verdict shall be given for the defendant.” Then the 2nd section enacts, that, for an act done by a justice without jurisdiction, or where he exceeds his jurisdiction, it shall not be necessary to make the averment in the declaration as required by the 1st section; *provided*, that, in case the

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act is done under a conviction or order, such conviction or order shall have been first quashed. Under the latter count, the plaintiff was not entitled to succeed upon the count of this declaration, inasmuch as the conviction was not only not quashed, but it was given in evidence; indeed, that count could not be supported, except by proof of that instrument: *Haylock v. Sparke* (a), *v. Cookson* (b). The conviction, if good on the face is conclusive evidence of the facts it contains: *Bray v. Kinnaird* (c). The 8th section enacts, that "no action shall be brought against any justice of the peace for anything done by him in the execution of his office, unless the same be commenced within six calendar months next after the act complained of shall have been committed." The 9th section enacts, that "no such action shall be commenced against any such justice of the peace until one calendar month at least after a notice in writing of the intended action shall have been delivered to him or to some person named in the notice." And the 11th section enables the justice to tender amends, and the injured party may accept the sum tendered in satisfaction of his damages; and if he do not accept the sum, the amount of damage becomes a question for the jury. So that the statute does not give a defence to an action; and the defendant may tender a very large sum of money, which, nevertheless, the jury may think insufficient. Now, the 1st section shews, that the justice must be proved to have acted maliciously, to be subject to such an action as is embodied in the second count; and a notice of action is not necessary in a case where there is no cause of action. And further, the 8th section speaks of the action being brought against the justice "in the execution of his office," "duty;" and the 9th section says "such action," taken against him "in the execution of his duty." The first count of the declaration alleges, that the defendant was

(a) 1 E. & B. 471. (b) 16 East, 13. (c) 1 Bro. & Bing.

acting; and, therefore, as far as regards the notice of action his bona fides is immaterial. None of the numerous authorities upon the question of bona fides affect this point. In the following cases, where the question arose, the defendant's act, by its character, rendered it a doubtful matter whether the act, as done, was or was not believed by the defendant to have been done by him in pursuance of the particular statute affording him protection:—*Staight v. Gee* (a), *Cook v. Leonard* (b), *Beechey v. Sides* (c), *Cann v. Clipper-ton* (d), *Hazeldine v. Grove* (e), *Kine v. Evershed* (f), *Briggs v. Evelyn* (g), *Bird v. Gunston* (h), *Morgan v. Palmer* (i), *Weller v. Toke* (k), *James v. Saunders* (l), *Wright v. Wales* (m), *Hughes v. Buckland* (n), *Horn v. Thornborough* (o), *Booth v. Clive* (p). [*Martin, B.*—What do you say to *Wedge v. Berkeley* (q)?] There the character in which the defendant acted was equivocal. It was perhaps a question there for the jury, whether the defendant bona fide believed that he was acting as a magistrate. Here it is admitted on the record that the defendant acted in the execution of his duty, although he acted maliciously.

In the next place, if it was necessary, to entitle the defendant to notice, that he should have entertained a bona fide belief that he was acting in the execution of his office under this statute, that is a question proper for the decision of the presiding Judge. This Court so decided in the recent case of *Arnold v. Hamel* (r), upon the language of the 8 & 9 Vict. c. 87, which is similarly worded to the 11

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(a) 2 Stark. 445.

(b) 6 B. & C. 351.

(c) 9 B. & C. 806.

(d) 10 A. & E. 582.

(e) 3 Q. B. 997.

(f) 10 Q. B. 143.

(g) 2 H. Bl. 114.

(h) 2 Chit. 459.

(i) 2 B. & C. 729.

(k) 9 East, 364.

(l) 10 Bing. 429.

(m) 5 Bing. 336.

(n) 15 M. & W. 346.

(o) 3 Exch. 846.

(p) 10 C. B. 827.

(q) 6 A. & E. 663.

(r) 9 Exch. 404.

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& 12 Vict. c. 44. The 12th section of this Act requires the plaintiff to prove that the necessary notice has been given, on failure of which the plaintiff is to be nonsuited, or a verdict is to be given for the defendant.—He referred to *Wagstaffe v. Sharpe* (a), and *Shearwood v. Hay* (b).

E. V. Price in support of the rule.—The plaintiff contends, first, that the 11 & 12 Vict. c. 44, has no application to the present case; and secondly, that, if it has, the learned Judge ought to have left the question to the jury whether the defendant acted *bonâ fide* or not in the execution of his office as a justice of the peace. In the latter view of the case, the law remains as it stood under the 24 Geo. 2, c. 4. Now, the declaration does not charge the defendant with having done improperly any act in the execution of the office of a magistrate, which was illegal as being either contrary to law or an error in fact; but the declaration charges him with having colourably made use of the power given him for the purpose of satisfying a personal grudge; and, therefore, he cannot be said to have acted in the execution of his office. The 9th section of the 11 & 12 Vict. c. 44, applies only to those cases in which matters are properly brought before the justices, but in which they act improperly. The defendant here was no more protected than a private person would be. *Barton v. Bricknell* (c) is in favour of this view.

Secondly, assuming the statute 11 & 12 Vict. c. 44, to apply, the question whether the defendant acted *bonâ fide* or not, was for the jury. If the defendant did not so act, he was not entitled to notice. [*Parke, B.*—The first count cannot be sustained. The second count shews that the defendant was acting as a magistrate, which a person may do although he acts maliciously; and the 1st section of the statute contemplates his acting maliciously. The plaintiff's case is,

(a) 3 M. & W. 521.

(b) 5 A. & E. 383.

(c) 13 Q. B. 393.

that the defendant was abusing his authority as a magistrate. Then the 9th section requires a notice to be given. [Platt, B.—The second count does not state that the defendant did the act maliciously.] No objection of that description was raised at the trial; and if it had been, no doubt an amendment would have been allowed.

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PARKE, B.—I am of opinion that this rule ought to be discharged, as I think, that, under the circumstances, the writ was right. The declaration consists of two separate charges. The first count alleges that the defendant assaulted the plaintiff, and caused him to be imprisoned in the house of correction at Beverley. In order to prove that count, the plaintiff gave in evidence an instrument which is both a commitment and a conviction. Upon that count, the plaintiff, by so doing, put himself out of Court, for he shewed a conviction good on the face of it, and which, not having been quashed, afforded a protection to the defendant as a magistrate, under the 2nd sect. of the 11 & 12 Vict. c. 44. The second count admits that the defendant in doing the act complained of acted as a magistrate, for it alleges, that the defendant, having maliciously instigated the plaintiff's master to make a complaint before him as a justice of the peace, maliciously convicted the plaintiff of the offence charged, and wilfully and without sufficient cause issued his warrant of commitment. Upon the face of that count, it clearly appears that the defendant acted as a justice of the peace, and as such he was entitled to notice of action, as required by the Act of Parliament. Now, whether the question of bona fides, in a case where it arises, is one for the Judge or for the jury, I think it to be unnecessary to give any opinion. In *Hazeldine v. Grove* (a), the Court of Queen's Bench refused to grant a new trial, on the objection that the question of bona fides was for the

(a) 3 Q. B. 997.

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jury, on the ground that the plaintiff had not demanded that that question should be put to the jury. The Court there said, that such questions were for the jury, although it was the common practice to submit them first to the Judge. But I entertain some doubt whether that law now holds good in actions against magistrates as such. In the recent case of *Arnold v. Hamel (a)*, where the question as to the necessity of notice turned upon the wording of the Customs Act 8 & 9 Vict. c. 87, this Court held that the question was for the Judge. At that time it was not present to my mind that the wording of the Customs Act was very similar to that of the statute 24 Geo. 2, c. 44, s. 8. If the case stood upon the last-named statute, I should have thought that the law as laid down in *Arnold v. Hamel* applied. The wording of the 11 & 12 Vict. c. 44, is rather different; but I do not think that such dissimilarity affects the question, and I doubt, whether these preliminary matters about notice and so forth are not properly for the determination of the Judge. It is, however, unnecessary to decide that point, as under the circumstances of the present case the nonsuit was right. Now, the 1st section of the 11 & 12 Vict. c. 44, assumes that a person may act *maliciously* and without reasonable and probable cause, and nevertheless be acting in the execution of his duty as a justice of the peace. The 9th section says, that "no *such* action shall be commenced against *such* justice of the peace, until one calendar month at least after a notice in writing of such intended action," &c.; and in order to see what is meant by the words "such action," by referring to the previous section (sect. 8), we find that "no action shall be brought against any justice of the peace for anything done by him in the execution of his office, except the same be commenced within six calendar months," &c.; so that, taking these sections together, it is clear that a person may act maliciously, and yet act in the

(a) 9 Exch. 404.

execution of his office as a justice of the peace, and that in such case notice must be given to him. The learned Judge therefore acted rightly in nonsuiting the plaintiff, in the absence of notice. As to the facts of the case, I think that there was no evidence of want of reasonable and probable cause; but the learned Judge seems not to have proceeded upon that ground, which was a matter for his consideration, but upon the want of the notice of action. The plaintiff in this action proceeds against the defendant solely in his character of a magistrate, and a notice of action is required by the statute, that the magistrate may have the opportunity of tendering amends. I may add, that these observations apply only to this statute, and not to those cases which may arise under various Acts of Parliament, affording protection to persons who act under a bonâ fide belief that they are acting under the provisions of the particular Act which is supposed to give them authority.

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PLATT, B.—I am of the same opinion. The question appears to me to turn wholly upon the construction of the 11 & 12 Vict. c. 44, illustrated, so far as it can be, by the various decisions which have proceeded upon similar statutes, and more especially upon the 24 Geo. 2, c. 44. The arrangement of the 11 & 12 Vict. c. 44, is not very perspicuous; and I must say, that I do not well understand it. The 1st section, which applies to the case of a magistrate acting within his jurisdiction, does not make it necessary that the conviction should be set aside before the action can be brought. But by the 2nd section, in which the case is contemplated of a person acting wholly without jurisdiction, the conviction must be first set aside. One would have supposed that the Legislature intended to provide for the opposite result, namely, that when a magistrate acts maliciously and without reasonable and probable cause, but within his jurisdiction, it should be necessary to remove that which prevents the action, namely the conviction; and

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that in a case where the party has acted wholly jurisdiction, to leave it as it stood. Be that, however, may, I think this nonsuit was right. The 8th uses the terms, "in the execution of his office," while the 1st section says "duty." The 8th section does not refer to any section in particular, and may be taken to apply to the 1st and 2nd sections in the cases where a defendant acted either with or without jurisdiction. This may be for the change of language in the different sections of the Act. It appears to me, that the present case falls within the 1st section. It may be true that the defendant was the master of the plaintiff to make the complaint; nevertheless, when made, he had jurisdiction. But in that case, according to the 1st section, it is necessary to allege in the declaration, and to prove, that the defendant acted *maliciously* and without reasonable and probable cause. Then, according to the 9th section, the defendant is entitled to notice, whatever may have been his cause for that instigation. It seems to me, therefore, upon consideration of these sections of the 11 & 12 Vict. c. 12, that the learned Judge acted rightly in holding that no action ought to have been given in this case.

MARTIN, B.—I have come to the same conclusion upon an examination of the real cause of action against the defendant, I apprehend that the case falls within the 1st section of the Act. Assuming the second count to be so far amended as to meet any objection to its form, the complaint is, that the defendant maliciously instigated the plaintiff's master to prefer a charge against the plaintiff in breach of his duty as a servant; and that the defendant, without sufficient evidence of any such breach of duty, convicted him of the offence, and sent him to prison; in other words, that the defendant, apparently without jurisdiction in the matter, without reasonable or probable cause, convicted the plaintiff. That is a case with

1st section of the Act, and the defendant is entitled to notice under the 9th section. It is clear that the plaintiff was sent to prison under a conviction of the defendant as a justice of the peace. This was an act by the defendant in the execution of his office, and, under the section mentioned, he was entitled to notice.

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Rule discharged (a).

(a) As to the *form* of the notice, see *Taylor v. Nesfield*, 3 E. & B. 734; *Erle, J.*, there says, "If the act of a magistrate is done without jurisdiction, it is a trespass; if within the jurisdiction, the action rests upon the corruptness of motive, and to establish this the act must be shewn to be malicious."

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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

June 17.

PLACE v. POTTS and Another.

To an action for freight, the defendants pleaded in bar of the further maintenance of the action as to a certain sum, parcel of the money claimed, the hypothecation of the ship and freight by the master, a suit in the Admiralty Court by the obligee of the bottomry bond, a monition commanding the defendants on or before a day named to bring into the registry the money due for the freight to abide the judgment of the Court con-

cerning the said bond, or to appear and shew good cause to the contrary, and further and to receive as unto law and justice should appertain; and that the defendants, being to shew any such cause, did, in obedience to the monition, after the commencement of the action, and were forced to, pay into the registry the said sum of money, to abide the judgment of the Court:—*Held*, on error, affirming the judgment of the Court below, that the Court of Admiralty has jurisdiction to decide all questions as to freight in such a case, the plea was good.

THIS was a proceeding in error upon a judgment of the Court below in favour of the defendants(a).

Watson, (C. E. Pollock with him), for the plaintiff in error, (the plaintiff below(b)), (June 16).—The institution of the proceedings in the Admiralty Court between the plaintiff and the defendants is no bar to this action. The plaintiff is no party to the suit in the Admiralty Court; he is merely monished to pay the proceeds of the wreck into the registry. If the Court of Admiralty had proceeded to judgment, it might be admitted, that such proceeding, had it been a judgment in rem, would have been pleadable in bar of this action; but the plea sets up as a defence the pendency of a suit in which the result is not ascertained. Prior to the statute 3 & 4 Vict. c. 65, the Court of Admiralty had no power to deal with the freight, which was coverable only in a Court of common law. It is submitted that the proceedings in the two Courts being different

(a) 8 Exch. 705, where the pleadings are fully set out. *Wightman, J., Cresswell, J., Esq., Williams, J., Crompton, J.,*
(b) Before *Coleridge, J., Maule, J., Crowder, J.*

one being *in personam* and the other *in rem*, the pendency of the proceeding in the Admiralty Court cannot be pleaded in bar to an action for freight in a Court of common law. There is no direct authority upon the question. *Harmer v. Bell*(a) is the converse of this case. It may, however, be cited in support of the plaintiff's position. *Jervis, C. J.*, there says, in delivering the judgment of the Court, "We have already explained, that in our judgment a proceeding *in rem* differs from one *in personam*; and it follows, that, the two suits being in their nature different, the pendency of the one cannot be pleaded in suspension of the other." If, in the event, it should be held that the bond holder has no right to recover, or if that suit should be compromised by the parties to it, and this plea be held to be a good answer to this action, it is for ever barred. [*Cresswell, J.*—The question depends upon the point how far the Admiralty Court has jurisdiction to adjudicate upon the freight. If it has complete jurisdiction, we must assume that it will do what is equitable; and if it should be found that the defendants are entitled, as between the obligee of the bottomry bond and themselves, to the money, it would be returned to them.] If the question as to freight arises incidentally, the Court of Admiralty cannot do complete justice between the parties; and in such case the Court of Chancery is the proper tribunal for redress: *Duncan v. McCallmont*(b), *The Guardian*(c). The pendency of the proceeding in the Admiralty Court cannot be pleaded in bar to the action. A foreign attachment is no bar to an action, unless it be pleaded as having been commenced before action brought: *Babington v. Babington*(d), *Humphrey v. Barnes*(e), *Webb v. Hurrell*(f). The Court below, in their judgment, proceeded upon the assumption that the Court of Admiralty has jurisdiction to settle all questions with

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(a) 7 Moore P. C. 267.

(b) 3 Beav. 409.

(c) 3 Rob. Adm. Rep. 93.

(d) Cro. Eliz. 157.

(e) Id. 691.

(f) 4 C. B. 287.

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reference to the freight; and they adopted the opinion of Dr. *Lushington* in the case of *The Dowthorpe*(a), to which the Court was referred by that learned Judge. He there says, "seeing that the Statute 3 & 4 Vict. c. 65, ss. 3 & 4(b), has relieved the Court from all obstacles which formerly existed as to the titles of mortgagees in respect to the ship, I cannot but think that the same statute which enables this Court to adjudicate upon the claims of mortgagees against ships, virtually confers upon the Court the same power over the freights, or the funds in Court representing the freights, otherwise it would be impossible for the Court to determine a question of mortgage upon the net proceeds of the ship itself." It is, however, submitted, that such jurisdiction, which did not exist prior to the statute, is not given by it: *Haly v. Goodson*(c). The 3rd and 4th sections give the Court of Admiralty jurisdiction over the claims of the mortgagees of vessels, and enable it to decide all questions as to the title to the vessels, "or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages, or bottomry," instituted in that Court. There is no mention of freight. The statute cannot apply to money due as freight in the hands of the owner of the goods. The Court of Admiralty, therefore, could not do complete justice between the parties. Story's Conflict of Laws, p. 592.—There is a further objection to the plea. It does not shew that the obligee of the bond had a right of action in the Admiralty Court. It is not alleged that the vessel had arrived at her port of destination, which would be essential to give the bondholder a right of action. The plea merely states, that the plaintiff was entitled to freight. [*Maule, J.*—The substance of the plea is, that the Court of Admiralty has jurisdiction in the matter. If the vessel had not arrived, the

(a) 2 W. Rob. 73.

(b) Sect. 32, in the report by mistake.

(c) 2 Meriv. 77.

suit fails; but that does not deprive the Court of jurisdiction.]

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Bramwell (*Lush* with him) contra.—It is admitted by the plaintiff that the defendants have been compelled to pay the freight into the registry of the Admiralty Court, and that they have no means of getting a return of it. If the plaintiff succeeds in this action, the defendants will have twice to pay the same claim. [*Erle*, J.—I wish to have judicial certainty that the Court of Admiralty has jurisdiction to make a proper distribution of the freight. The Court of Exchequer appears to have acted on the opinion of Dr. *Lushington*, for whose opinion I entertain great respect; but I wish to be informed whether there is any further and direct authority upon the point.] The Admiralty Court must have the jurisdiction relied upon by the defendants, from the nature of the proceedings. The parties are brought into the Court as the possessors of a certain *res*, over which that Court has jurisdiction; and that *res* being brought into Court, the parties have lost their control over it, as it is taken out of their hands. In the case of *The Dowthorpe*, it is rightly assumed, that the Court of Admiralty has such jurisdiction.—He was then stopped by the Court.

Watson replied.

Cur adv. vult.

The judgment of the Court was now delivered by

COLERIDGE, J.—This was an action for freight, and the defendants pleaded in bar to the further maintenance of the action, as to 386*l.* 17*s.* 9*d.*, parcel of the money claimed, the hypothecation of the ship and freight by the master, a suit in the Admiralty Court by the obligee of the bottomry bond, a monition commanding him, on or before a day named, to bring into the registry the said money due for the freight, to abide the judgment of the Court concerning the said bond, or to appear and shew good cause

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to the contrary, and further to do and receive as unto law and justice should appertain; and that, being unable to shew any such cause, they did, in obedience to the monition after the commencement of the action, and were forced to pay into the registry the said sum of money, to abide the judgment of the Court. To this plea there was a general demurrer, and in the Court below judgment passed for the defendant; and as we think properly.

It cannot be disputed that the Court of Admiralty had authority to compel the defendants to pay into the registry to abide its judgment on the bottomry bond, the amount due for freight, being the very sum sought to be recovered in this action.

The jurisdiction of the Court in this respect is perfectly well established, and its nature well known. The suit is not merely against the person of the ship, or freight owner or consignor or consignee of the goods, but against the things themselves, the ship or the freight, as the case may be—this latter being treated not as a chose in action but in esse, and represented by the money which is to be paid. These, then, being brought into the registry, and under the dominion of the Court, are there subject to its judicial disposition, in the first place, for the purposes of the matter immediately in issue—the claim, namely, of the obligee of the bottomry bond. There may or may not be a surplus after satisfying that claim; but the jurisdiction would be extremely imperfect, if, in the second place, on the supposition of there being a surplus, the Court had not power to deal with that also, to the extent, at least, of deciding on the claims to it of all the parties who are before it. It is unnecessary to extend this to those who may claim under these and are not before the Court; these, whether assignees in case of a bankruptcy or claiming in any other way, will not be prejudiced in their rights of action by this adjudication by the Court, or the claims of those who are before it. This jurisdiction, which seems to grow almost

necessarily out of the admitted nature of the suit, being a suit in rem, we find, by the information communicated to the Court below by the very learned Judge of the Admiralty Court, to be in fact exercised; and we think it unnecessary to have recourse to the statute of the 3 & 4 Vict., mentioned in the argument, in order to support the jurisdiction.

In this view of the case the plea seems to us to be a clear answer to the action. The very subject-matter on which the plaintiff's claim in this suit rests has by a competent authority been taken out of the hands of the defendants and paid into the registry, to abide the disposition of the Court in the suit there. The plaintiff himself is also before that Court in the same suit, and will receive for it whatever he is ultimately entitled to from the defendants. This, then, is in fact a payment to him; and there would be a manifest injustice, if, at the same time, he could in this Court compel the defendants to pay the money over again to him. He, by his agent, has borrowed and had the benefit of the money raised by the bottomry bond. By that advance, in fact, the freight has been earned, and that advance the plaintiff has not repaid; he cannot, therefore, complain of this effect being given to the Admiralty proceedings. The judgment of the Court below must be affirmed.

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Judgment affirmed.

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July 3.

THE GREAT NORTHERN RAILWAY COMPANY *v.*
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The defendants, a railway company, were in the practice of allowing the reporters of a London newspaper, when going to country races on the defendants' line for the purpose of framing their reports, to travel on the defendants' line carriage free. The reporter was for such purpose supplied with a ticket by the company, which had written upon it the name of a person in the reporting department.

The ticket also purported on the face of it to be not transferable; and it was also a memorandum on it, to the effect, that any party, other than the person named in it, using the pass, would be liable to the penalty which a passenger incurs by travelling without having paid his fare, or that he should be liable to pay the fare; but it did not distinctly appear which of these two liabilities was stated in the memorandum, and, in the former, it did not appear what the penalties were which were alluded to. The plaintiff acting *bonâ fide*, and going on the business of the journal, and entitled by the usage to have the benefit of a ticket with his name on it, went to the station with a ticket such as that described. His name, however, was not upon it, but there was that of another person who, however, was a reporter and in the same department with himself. The plaintiff shewed this ticket to the porter at the station, whose business it was to examine passengers' tickets, who said that it was all right, and placed the plaintiff in a carriage. There was no distinct evidence, however, that the porter knew personally who the plaintiff was. It appeared, that the plaintiff and other reporters had, on several occasions before, travelled with similar tickets not bearing the names on them of those who used them; and there was evidence, that the persons whose names were on the tickets were personally known to some of the officers and servants at the station.

In an action by the plaintiff against the company for an injury received on their line while travelling in one of the company's carriages, in which the declaration alleged that "the plaintiff then lawfully was," and which allegation was denied by the plea; the question having been left to the jury, and a verdict having been found for the plaintiff:—*Held*, error on a bill of exceptions, that there was evidence for the jury in support of the issue and that the question was rightly left to them.

ERROR by the defendants below on a bill of exceptions. The third count of the declaration stated that the plaintiff at the time of the committing of the grievance hereafter mentioned, was lawfully in a certain carriage upon a certain public highway called the Great Northern Railway, and the defendants were then possessed of certain carriages which were then being propelled and driven along the said highway, under the care, governance, and guidance of the defendants; and that the defendants so carelessly, negligently, and improperly conducted themselves in the propelling and driving of the carriages along the said railway, that, by reason of such carelessness, negligence, and improper conduct of the defendants, the plaintiff, whilst he was lawfully upon the highway as aforesaid, had his leg broken and was otherwise much injured, whereby he remained ill for a great length of time, &c., and was prevented from attending to his business as a reporter, which he was then carrying on, &c.

Plea—That the plaintiff at the time of the committing of the alleged grievance was unlawfully and not lawfully in the said carriage as alleged.—Issue thereon.

At the trial, before *Martin*, B., at the Middlesex Sittings after last Easter Term, it appeared that the action was brought by Harrison to recover compensation for a serious injury which he had sustained whilst travelling in one of the defendants' carriages upon their railway, under the following circumstances:—There was a practice existing between the Great Northern Railway Company and the proprietors of Bell's Life Newspaper, for their mutual convenience, that the former should allow the reporters of the latter, when going to country races on the line for the purpose of framing their reports, to travel in their carriages free. The reporter was for that purpose supplied with a ticket, which upon the face of it had written the name of a person in the reporting department other than the plaintiff, who was, however, himself in that department; it also purported on the face of it to be not transferable, and had a memorandum to the effect that any party other than the person named in it using the pass, would be liable to the penalties which a passenger incurs by travelling without having paid his fare, or be liable to pay the fare. It did not distinctly appear which of these two liabilities was stated in the memorandum; and if the former, it did not appear what the penalties were which were alluded to. The plaintiff acting *bonâ fide* and going on the business of the journal, and entitled by the usage to have the benefit of a ticket with his name on it, went to the station with a ticket such as that described, and shewed it to the porter at the station, whose business it was to examine passengers' tickets, who said it was all right, and placed him in a carriage. There was no distinct evidence, however, that he knew personally who the plaintiff was. It appeared that the plaintiff and other reporters had, on several occasions before, travelled with similar tickets not bearing the names on them of those who used them; and there was evidence that the persons whose names were

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on the tickets were personally known to some of the officers and servants at the station.

Upon these facts, which closed the case for the plaintiff it was contended, on the part of the defendants, that the plaintiff ought to be nonsuited, as there was no evidence for the jury; and that the learned Judge ought, as a matter of law, to decide, upon the construction of the ticket, that the plaintiff was not lawfully in the carriage. The learned Judge, however, held that there was evidence for the jury and he left the question to them; and they returned a verdict for the plaintiff, with 400*l.* damages. The defendant excepted to this ruling, and, error having been suggested upon the bill of exceptions, the case was argued (*a*) (July 17) by

Bramwell, for the plaintiffs in error, the defendants below.—There was no evidence for the jury in support of the issue raised by the plea, that the plaintiff was lawfully in the carriage on the company's line of railway at the time of the accident. This question turns on the effect of the separate classes of evidence taken collectively. First, upon the form of the ticket; secondly, upon the fact of a servant of the company having admitted the plaintiff below in one of the company's carriages upon his presenting the ticket; and thirdly, on the practice of permitting other individuals to travel on the line with passes, as taken in conjunction with the state of the servant's acquaintance with the person admitted into the carriage. Now, the ticket was not transferable; and, by its express terms, a person improperly availing himself of it, by so doing subjected himself to a penalty. It was not made out in the name of the plaintiff, but in that of another person. The servant had no authority from the company to allow a person presenting such a ticket to enter a carriage, unless he

(*a*) Before *Coleridge, J., Maule, J., Williams, J., Crompton, J., and Wightman, J., Cresswell, J., Erle, J., Crowder, J.*

knew the person's name; and if he admitted a person whose name he knew was not upon the ticket, he had no authority for the act. Then, as to the practice of allowing persons to travel with such tickets, there was no evidence that it had been done with the sanction of the company. And even if they had not noticed it on former occasions, that is no ground for their not objecting to it when they please. [*Cresswell*, J.—Assuming the ticket to have had the words, “Bell’s Life,” “not transferable,” might not that mean that the ticket could be used by gentlemen engaged on the staff of that paper, but only by them?] That would hardly be giving the reasonable construction to the words “not transferable.” The natural meaning of such language is, that the ticket shall not be used by any person other than by him whose name is upon it. And it is submitted, that the learned Judge was guilty of a misdirection in putting another construction upon it.—He cited *York, Newcastle, and Berwick Railway Company v. Crisp* (a), and *Slim v. Great Northern Railway Company* (b).

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Prentice contra.—The defendant in error is entitled to succeed upon this issue, if it can be shewn that there was any evidence, however small, that he was in the carriage by the license of the company. There was such evidence. The plaintiff was travelling with a pass, which he used *bonâ fide*, under the belief that he acted rightly. The form of the ticket did not preclude the inference that it could not be used except by the person whose name it bore. It is admitted, that a person unconnected with the newspaper could not have availed himself of it as the license to travel on the company's railway. But it was the common practice for the reporters upon the paper to travel with these passes. It did not appear what the penalty was to which a party might be subject. The bye-laws of the company were not in evidence. The penalty might

(a) 14 C. B. 527.

(b) 14 C. B. 647.

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have consisted in the payment of the fare. But that could not make the act of the traveller unlawful. And moreover, the company might waive the condition of the ticket's being not transferable, inasmuch as that was a matter purely for their own benefit. They may waive a bye-law: *Mayor of Berwick on Tweed v. Johnson* (a). Now the company was bound by the act of their servant, who acted in accordance with the usual practice of the line by admitting a person into a carriage upon the presentation of the ordinary pass-ticket: *Giles v. Taff Vale Railway Company* (b). Under these circumstances there was some evidence that the plaintiff was a traveller by the license of the company. At all events he cannot be treated as a trespasser.

Bramwell replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

COLERIDGE, J.—The question in this case arises upon a bill of exceptions to the ruling of my Brother *Martin* in regard to the issue upon an allegation in the third count of the declaration. This allegation was, that the plaintiff below, at the time of the committing the grievance complained of, was lawfully in a certain carriage upon a certain public highway. The plea to this count was, that the plaintiff below was at the time unlawfully and not lawfully in the said carriage as alleged; on which the plaintiff below took issue. It was objected, at the close of the case for the plaintiff, that there was no evidence to be submitted to the jury in support of it; that it appeared from the evidence offered, that the plaintiff was unlawfully in the carriage; that the learned Judge ought so to direct the jury, and that he ought so to decide as a matter of law from the construction of a certain pass-ticket which had been given in

(a) *Lofft*, 334.

(b) 2 E. & B. 622.

evidence. The learned Judge however told the jury, that there was evidence for their consideration, and left to them the question, whether, at the time of committing the alleged grievances, the plaintiff was lawfully in the said carriage. We are of opinion the ruling of the learned Judge was right.

The evidence in the case may be fairly taken to have amounted to this: [His Lordship stated the evidence as set forth in the commencement of the report, and proceeded:]—

In considering upon this evidence the question we have to decide, much will depend upon the sense in which we are to understand the issue. We think it does not raise any point as to the lawfulness of the carriage being on the highway, i. e. the railway; or, if it does, that it is clear the carriage was there lawfully as between the plaintiff and defendants; but the point is whether or not the plaintiff was in the carriage under such circumstances as that he must be considered a trespasser. Now, upon the issue so stated, we think the pass-ticket not so conclusive as to make the other circumstances wholly immaterial. The defendants might issue tickets in a form which purported to make them not transferable, and yet they might not unreasonably permit them to be used by other persons belonging to the same department, which permission would be a convenience to the newspaper proprietors, and might be a matter of indifference to themselves. The practice which had prevailed was not conclusive of this, because it was not conclusively shewn to have been known by the defendants or any officer authorised to permit it; but there was evidence of such knowledge, and on which the jury might find it to have existed; and if the jury should be of opinion that this irregular use of the tickets, however worded, was with the knowledge and permission of the superintendent of the station whom the defendants placed there to regulate such matters, this would be such evidence of a license as would make it wrong to say that the plaintiff was a trespasser in

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the carriage. Other considerations might arise on the language of the memorandum, if we knew it more certainly than we do; for if the plaintiff by the use of the ticket, though unauthorised, only made himself liable to the payment of the fare, or to an increased fare, he could not then be considered a trespasser. But without entering on these considerations as to which the facts fail us, it appears to us that there was something for the jury, and that is all we need hold in order to decide that the judgment should be, as we think it ought to be, affirmed.

Judgment affirmed.

July 3.

PALMER and Another v. NAYLOR and Others.

To a declaration on a policy of assurance on advances for the transport of Chinese emigrants from China to Peru,

THIS was a proceeding in error upon a judgment of the Court below in the case of *Naylor v. Palmer (a)*, in which judgment had been given for the plaintiffs below.

The case was argued in the present Sittings (June 16 and 17) by

for their outfit and provisions, to be paid on the arrival of the emigrants at the port of destination, the perils insured against being "pirates, rovers, thieves &c., barratry of the master and mariners, and all other perils, losses, and misfortunes, &c.," in the usual form; the declaration alleging a total loss by the emigrants piratically and feloniously murdering the captain and part of the crew, and feloniously stealing and carrying away the ship—the defendants pleaded, first, that, as soon as the emigrants had committed the murder and had obtained possession of the vessel, they steered for the nearest land, for the purpose of being landed, and refused to and would not proceed upon the voyage; and the vessel was then fit and able safely to proceed to the said port, and the remainder of her crew could have navigated her there, and were ready and willing to convey the emigrants there if they would have gone, but that they would not; and that, by reason of such refusal, and for no other cause whatsoever, the transport was never completed.

Secondly, as to the taking and carrying away of the vessel, that the emigrants were unwilling to be carried on the said voyage, and that they committed the murder and took possession of the vessel for the purpose of being landed and of escaping and from being carried on the voyage, and for no other purpose, which is the said piratical carrying away of the vessel.

Held, on error, affirming the judgment of the Court below, that the murder of the captain and of part of the crew, and the seizure of the vessel by the emigrants, as alleged in the declaration and admitted by the pleas, was, if not a piratical act, one ejusdem generis, and therefore within the perils insured against; and that, as the loss was complete at that moment and was never reduced, the unwillingness of the emigrants to proceed was not the cause of the loss, but was wholly immaterial; and consequently that the pleas were bad.

(a) 8 Exch. 739, where the pleadings are fully set out.

Bramwell for the plaintiffs in error, (the defendants below) (a).—The pleas are based upon the proposition that the loss for which the plaintiffs proceed was not occasioned by one of the perils insured against. It is admitted by both sides, that the insurance is not upon the ship nor upon the Coolies considered as property, but upon their safe arrival at Callao, in Peru. The question rests upon the principle of law, that, in considering the cause of the loss, the *causa proxima* is alone to be regarded. Assuming the conduct of the Coolies to have been piratical, what was the cause of the loss? The answer is, their unwillingness to proceed on the voyage, and that unwillingness was the cause. That is not provided against by the terms of this policy, and consequently the loss is not attributable to a peril insured against. If this policy had contained a clause exempting the underwriters from all liabilities for loss arising from the unwillingness of the Coolies to continue the voyage, it could not be contended by the defendants that the underwriters would be liable in a case like the present. Now this instrument ought to be read as if it contained such negative words. The proximate cause alone is to be considered. In *Tatham v. Hodgson* (b), which was a policy of insurance upon slaves against perils of the sea, it was held that the death of the slaves by the failure of sufficient and suitable provisions, occasioned by extraordinary delay in the voyage from bad weather, was not a loss within the policy, but a loss by natural death. In *Livie v. Janson* (c), a ship "warranted free from American condemnation" was driven upon the rocks and mud, though only partially damaged, in trying to escape by night out of the port of New York from an American embargo, but the next day, having been deserted by her crew, was got off by

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(a) Before Coleridge, J., Maule, J., Crowder, J.

Wightman, J., Creswell, J., Wil- (b) 6 T. R. 656.

liams, J., Crompton, J., and (c) 12 East, 648.

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the Americans and condemned by them for breach of the embargo; the underwriters were held to be protected from a claim for total loss by the warranty. *Jones v. Schmoll* [proceeded upon the same principle. [*Williams, J.*—Suppose the Coolies, preferring death to continuing the voyage, had scuttled the ship and had perished with her, would there have been a peril insured against?] Assuming the act to be piratical, it might perhaps be considered as the immediate cause of the loss. But that is not this case. Here there was an interval between the act and the loss, for the Coolies might have proceeded on the voyage, except for their unwillingness to do so. If the ship had been driven by stress of weather towards the shore, and some of the Coolies had leapt overboard and got on shore, from a desire to get away, and the ship had proceeded to the end of her voyage, it could not be said that the non-arrival of those Coolies had been caused by perils of the seas. The judgment of the Court below proceeds upon the assumption that the total loss was occasioned by the seizure of the ship. But, in so doing, the means is erroneously substituted for the cause. It is also there said "the running away with the ship was as much the cause of the loss as if the ship had been seized and taken out of the possession of the crew by strangers and then abandoned, and the cargo had consisted of wild animals who had escaped or been let loose by them while they were in possession, and could not be caught again after the captors abandoned the possession; or, as if slaves, (when lawfully the subject of insurance), who had been conveyed in a vessel that was driven on shore by perils of the seas and by reason thereof escaped; the perils of the sea would be the cause of a total loss of the subject insured" (b). But the cases put are not analogous to the present, for here the Coolies are free emigrants, and it is not to be presumed that they would escape; but, in the case of slaves or wild animals

(a) 1 T. R. 130, n.

(b) 8 Exch. 750.

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mals, their escape would be the inevitable and necessary consequence, if an opportunity were afforded them to do so. But the act which enabled the Coolies to avail themselves of their unwillingness to go, viz. the seizure of the ship, was not a piratical act within the meaning of this instrument. The act, to fall within such definition, must be one committed by something extrinsic of the thing insured. Here, the Coolies cannot be said to have committed an act of piracy upon themselves. The act to which the plaintiffs seek to attach the character of being piratical did not affect the ship, which was safe, but the Coolies themselves. This act does not fall within the definition of piracy as given by the most celebrated text writers: Emérigon's *Traité des Assurances*, ch. 12, § 28.

Blackburn contra.—It is admitted, that a total loss must be shewn to have been caused by one of the perils insured against, and that such peril must be the proximate cause. The transport has been rendered incomplete by a peril insured against. The objection, that the act, being done by the passengers themselves, is not an act of piracy or of thieves, if one *ejusdem generis*, has not been much relied upon. The declaration alleges, that the act of the Coolies at once put an end to the voyage and made a total loss. There being then *prima facie* a total loss, how do the pleas answer the claim? The eighth plea merely alleges, that such total loss was subject to a contingency, viz. to the possibility of the Coolies proceeding on the voyage. But this possible though most improbable contingency never occurred, and consequently the total loss was never reduced. The existence of the contingency is wholly immaterial. This principle is clearly expounded by the Court of Queen's Bench in *Dean v. Hornby (a)*. Lord Campbell, C. J., there says, "The underwriters undertake for the safety of the ship from April, 1851, to April, 1852. In December, 1851, she is taken by pirates. Then, in fact, a total loss has occurred. After that

(a) 3 E. & B. 180.

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she never is restored to the owners ; nor have they had opportunity of regaining possession. They have lost the possession by events over which they have no control, and therefore are entitled to the indemnity for which they have paid. The cases referred to establish this principle : that if once there has been a total loss by capture, that is construed to be a permanent total loss, unless something afterwards occurs, by which the assured either has the possession restored, or has the means of obtaining such restoration. The right to obtain it is nothing ; if that were enough to prevent a total loss, there never would in this case have been a total loss at all." And *Coleridge, J.*, says " the material question is, whether the possession was ever restored to the plaintiffs ; and it never was, from the first to the last. This principle runs through all the cases upon this point see *Dixon v. Reid* (a) and *Roux v. Salvador* (b). If the case of an insurance upon a ship, undoubtedly pirates have seized the ship, that would have been *prima facie* a total loss ; but if the ship had been recaptured by a Queen's vessel and had been restored before action brought, the total loss, which was subject to the contingency and which has happened, would have been reduced. If the Coolies have relented after the seizure of the vessel, and had submitted to be carried to the end of the voyage, the case would have been analogous to that last suggested. Here the piratical insurrection terminated the relation of transporter and transported. That was the precise moment at which the total loss occurred, and the cause which produced the particular state of things at that moment must alone be considered. The case put by the Court below as to the escape of wild animals does not conflict with the decision in *Livie v. Jason* (c), for there the possession of the owners had not been determined, and the loss was only a partial one. The point there decided is, therefore, irrelevant in the present case. *Bondrett v. Hentigg* (d), proceeded upon the fact, that the

(a) 5 B. & Ald. 597.

(b) 3 Bing. N. C. 266.

(c) 12 East, 648.

(d) Holt, N. P. 149.

goods never came again into the hands of the assured. In *Hahn v. Corbett* (a), the vessel was stranded by stress of weather, and whilst ashore was captured by the enemy; and yet it was held, that the loss was by a peril of the sea, and not by capture.

As to the ninth plea, it appears to be framed to raise several distinct defences. First: it is in the nature of a demurrer to the declaration, that the act of the Coolies in seizing the ship and murdering the captain and part of the crew is not piracy, inasmuch as the aggressors were passengers. [*Maule, J.*—It is not necessary that they should be melodramatic pirates.] It is said, that it was not the act of thieves, when the Coolies ran away with the ship. It is also said, that it was not an act of barratry, because the Coolies formed no part of the crew. But if the peril does not sufficiently fall within those insured against specifically, at all events, it is one ejusdem generis: *Nesbitt v. Lushington* (b). *Émérigon, Traité des Assurances*, c. 8, § 4, and c. 12, § 10. Secondly: the plea alleges, that the Coolies were unwilling to proceed previous to the seizure, and that they took the ship and murdered the captain and part of the crew for the purpose of escaping. But, if the principle of proxima causa is correct, the piratical act was the cause, and not the unwillingness to proceed; for, according to Bacon, we must not regard "the causes of causes, and their impulsions one on another." Such mere unwillingness did not determine the relation between the Coolies and the adventure. In conclusion, it may be observed, that the case put by the Court below in its judgment, as to the escape of slaves, is in conformity with an American decision of *Simpson v. Charleston* (c), where a vessel, having some slaves on board, was wrecked on a foreign coast, in consequence whereof they

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(a) 3 Bing. 205.

(b) 4 T. R. 783.

(c) *F. & Mar. Ins. Co.*, Dudley's

Rep. 239, cited in 1 Phillips on Insurance, p. 670, § 1129.

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were set at liberty on habeas corpus, and the insurer them were held liable in South Carolina.

Bramwell in reply.—It is clear, that upon this record Coolies would have arrived at the port of destination for their unwillingness to proceed, and that nothing external character prevented that result; this unwillingness on their part is not insured against by the policy. At all events, the piratical act (assuming it to have been one) was not the *sole cause* of the loss. But for that unwillingness, the loss would not have occurred. The loss is therefore not attributable *solely* to the piracy, and the insurer is not liable. The argument on the part of the plaintiffs makes the defendants insurers of the goods of the Coolies. [*Maule, J.*—The loss was the consequence of the piracy. The piracy may have been the consequence of that unwillingness to proceed, that was the motive.]

Lastly, the act does not fall within the definition of piracy as given by Emérigon, chap. 12, § 28. It was not done with a view to plunder, but merely for the purpose of escape. [*Maule, J.*—If a party of emigrants on a voyage to Australia change their minds and prefer going to California and to effect their object murder the captain and crew and seize the vessel, that would be an act of piracy.]

Cur. adv. v.

* The judgment of the Court was now delivered by

COLERIDGE, J.—This was a writ of error on a judgment of the Court of Exchequer: the pleadings were found at length in the 8 Exchequer Rep. 739. We have considered the case, and are of opinion that the judgment of the Court below must be affirmed, for reasons which need not state at any great length.

In the first place, it cannot be contended that the loss, supposing it to have resulted from the causes stated in

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declaration, even admitting the modifications introduced by the eighth and ninth pleas, was not attributable to the perils stated in the declaration, if it is to be considered that the acts of the Chinese emigrants or Coolies were the proximate, and not merely the remote cause of such loss. The admitted seizure of the vessel by them, the taking her out of the possession and control of the master and crew, and the diverting her from the voyage insured, were either direct acts of piracy or acts so entirely ejusdem generis, that, if not reducible to the special words of the policy, they are clearly included within the general words at the end of the peril clause.

The question then arises on the pleas, and the principle that the proximate cause was to be looked to was admitted, indeed insisted on, equally by both sides on the argument. The decision of the case therefore depends simply on a question of fact, what occasioned the loss? and this will be answered by determining another, when did the loss occur? If no loss occurred until after the Coolies had restored to the mate and crew the possession and control of the vessel, she being at that time in a fit condition to prosecute the original voyage and carry them to their destination, then their not being so carried to it may be referable solely and proximately to their unwillingness to be so carried. But if the loss was complete as soon as they had murdered the captain and forcibly taken possession of the vessel, and for a time put an end to the voyage, then the loss is referable proximately to that unlawful act of theirs, and the motive which induced them to commit it; their unwillingness, namely, to be carried to their original destination is immaterial to be considered, because remotely only the cause of what occurred.

We think the latter is clearly the true view of the case, and that nothing can make it more clear than the simple statement. Nothing was then wanting to make the loss complete. A change of circumstances might have reduced

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it; this, however, never occurred, and therefore may be missed from consideration.

On this short ground, the judgment of the Court must be affirmed.

Judgment affirmed.

July 3.

HAMMOND and Others v. BRADSTREET.

To an action of replevin alleging the taking of the goods in the plaintiff's dwelling-house in the county of Norfolk, the defendants pleaded, first, that they did not take the goods modo et formâ; and secondly, that they took them in the parish of S., in the county of Suffolk, *absque hoc*, that they took them in Norfolk, adding, by way of avowry for a return of the goods, that they took

THIS was a proceeding in error upon a bill of exchange. It was an action of replevin alleging the taking of the goods in the plaintiff's dwelling-house, called Vauxhall, in the county of Norfolk. The defendants pleaded, first, that they did not take the said goods modo et formâ; and, secondly, that they took the goods in Southtown, in the parish of S., in the county of Suffolk, in part of a house called Vauxhall, *without this*, that they took the goods or either of them in the county of Norfolk, as concluding to the country; and, in order to have a return of the goods, an avowry was added, that the goods were taken by the defendants as overseers of the parish of S. in the county of Suffolk, under the authority of the 43 Eliz. c. 2, "An Act for the Relief of the Poor." Upon these pleas issues were joined.

At the trial, before Lord Campbell, C. J., at the Assizes for the county of Norfolk, in 1852, the

plaintiff tendered in evidence the instrument of apportionment of the charge of S., duly sealed and confirmed by the Tithe Commissioners, dated ten years ago, together with the map annexed thereto and referred to therein. This map did not, nor did the map annexed, include the plaintiff's house or any land on the river on which the house was situated. *Quære*, whether these documents were admissible in evidence in support of the plea of the issue raised by the second plea.

The plaintiff also tendered in evidence the instrument of apportionment of the charge of S., duly sealed and confirmed by the Tithe Commissioners, dated ten years ago, together with the map annexed thereto and referred to therein. This map did not, nor did the map annexed, include the plaintiff's house or any land on the river on which the house was situated.

Quære, whether these documents were admissible in evidence in support of the plea of the issue raised by the second plea.

proved that the defendants took the goods in his dwelling-house, which was situate on the north side of a certain estuary called the Breydon Water, which is formed by the junction of the rivers Waveney and Wensum; and, in order to shew that the goods were taken in Norfolk, he tendered in evidence a map, printed on paper from an engraved copperplate, and having on the face of it, as part of the original impression, the following printed words and figures; that is to say, "A new map of the county of Suffolk, taken from the original map published by Mr. John Kirby, in 1736, who took an actual and accurate survey of the whole county; now republished, with corrections and additions, by Joshua and William Kirby, sons of the author, 1766, and engraved by John Ryland." The map (which, and the inscription upon which, appeared to be ancient) did not comprise any land lying to the north of Breydon Water as part of the county of Suffolk. This map was produced by a witness, who was a magistrate for the counties of Norfolk and Suffolk, and he stated, that he had bought it twelve or fourteen years before, and that it was in the same state as that in which it was when he bought it, and that at that time he had not heard of any dispute as to the boundaries of the two counties; and there was no evidence given to the jury that at that time there was any such dispute. The plaintiff further tendered in evidence the instrument of apportionment of the annual sum agreed to be paid by way of rent-charge in lieu of the tithes of Southtown, in the second plea mentioned, confirmed by the Tithe Commissioners of England and Wales, and duly sealed, dated the 14th of July, 1843, together with the map annexed thereto and referred to therein, which was also duly confirmed and sealed by the Tithe Commissioners. This instrument of apportionment did not, neither did the map, comprise either the plaintiff's dwelling-house or any land lying on the north side of Breydon Water.

The defendants' counsel objected severally to the recep-

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tion of these documents, but the learned Judge admitted them. To this ruling the defendants excepted.

Palmer (*Worlledge* with him) for the plaintiffs in error the defendants below (June 16) (a).—First, the map was improperly received. It is not an original map, but a copy with additions and corrections, and nothing is known of the persons by whom it was made. There was no evidence to shew that they were not alive. If the old map itself had been produced, this map would not have agreed with it. And it does not appear who the alleged maker of that map was; and, therefore, assuming it to have been made under proper authority, it cannot be taken to be an accurate delineation of what it professed to describe. [*Cresswell, J.* For aught that appeared, old Mr. Kirby might have lived in London.] And for that reason, the map of 1736 would not be receivable as the declaration of a person living in that particular neighbourhood, and consequently presumed to be acquainted with it; for the declaration of any other person will not do, but it must be that of a person “conversant with the neighbourhood:” per *Le Blanc, J.*, in *Weaver v. Sparke* (b). It did not appear that the map was made for any public purpose. In *Duke of Beaufort v. Smith* (c) a survey purporting to be made by order of Oliver Cromwell for his private use, and not as Protector, was held inadmissible, either as a public document or as evidence of reputation. Upon the same principle, an ancient document of the time of Elizabeth, and purporting to be a survey of the manor on a question as to the boundaries of the manor, was rejected, no authority for taking the survey being proved: *Daniel Wilkin* (d). In *Pollard v. Scott* (e), Lord Kenyon, C. ruled, that a copperplate map, taken by the direction

(a) Before *Coleridge, J.*, *Maule, J.*,
Wightman, J., *Cresswell, J.*, *Erle, J.*,
Williams, J., *Crompton, J.*, and
Crowder, J.

(b) 1 M. & Selw. 688.
 (c) 4 Exch. 450.
 (d) 7 Exch. 429.
 (e) 1 Peake N. P. 18.

the overseers of a parish, was no evidence on an issue whether a particular spot of ground was a highway or not. So in *Regina v. Inhabitants of Milton* (a), on the trial of an indictment for the non-repair of a highway, a map of the parish, produced from the parish chest, the map professing to have been made under an Inclosure Act (which was a private Act, and not printed), was held by *Erskine, J.*, to be inadmissible, there being no proof of the Inclosure Act. There does not appear to have been any dispute as to the boundaries of the two counties. The copy may have been bona fide altered, with the intention of making it correct, but it is not necessarily so. Further, it did not come out of the proper custody. All that was shewn was, that a gentleman had purchased it a few years before.

Secondly, the apportionment under the Tithe Commutation Act, and the map annexed to it, were not receivable. The commissioners had no power to determine the boundaries of a county under 6 & 7 Will. 4, c. 71. It did not appear that the boundaries of the parish and county were conformable at or near the place where the distress was taken. The commissioners might, by duly observing certain preliminaries, have determined the boundaries under the 1 Vict. c. 69, but this they were not shewn to have done.

Couch (*Byles*, Serjt., with him) contra.—First, the map being an ancient map, was admissible as evidence of reputation. [*Coleridge, J.*—How does it appear that the date of 1766 upon it is correct?] The date it bears is *prima facie* evidence of that fact: *Davies v. Lowndes* (b). [*Maule, J.*, —The document in that case came out of the proper custody.] The nature of the custody must depend upon the description of instrument. In the case referred to, the Court say, the rule, that the instrument must be presumed

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(a) 1 Car. & K. 58.

(b) 6 M. & Gr. 527.

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prima facie to have been written when it bears date, applies to instruments dated thirty years ago or upwards, the custody of which is "accounted for." It is, therefore, sufficient to produce the instrument from such custody as removes the suspicion of the instrument's having been tampered with. There is no ground here for any imputation of fraud. It is produced from such custody as it is not unreasonable, under the circumstances, that the document should be found in: *Bishop of Meath v. Marquis of Winchester* (a), *Bullen v. Michel* (b). Being an old document, it is admissible as the declaration of a deceased person. Here it is unnecessary to shew that the person whose declaration is relied upon was an inhabitant of that spot inasmuch as the boundary of a county is a matter of such general public interest, that every person may be presumed to have such an interest in the matter as to make his declaration admissible: *Freeman v. Phillipps* (c), *Crease v. Barrett* (d), and *Barker v. Ray* (e). [Coleridge, J.—We know nothing of the Kirbys whose declaration is relied upon, and the custody of the map is carried back a few years only.]

Secondly, the instrument of apportionment of tithe-rent-charge for the parish of Southtown, and the map annexed, were properly admitted in evidence. They were produced to shew that the place where the distress is alleged to have been taken did not pay tithe to Southtown, and therefore that it was not in it. The boundaries of the hamlet or parish of Southtown, and of the county, were treated as conterminous, and evidence of the boundaries of the parish were admissible to shew the boundaries of the county. In *Plaxton v. Dare* (f), where the question was, whether certain land was in parish A. or parish B., the land in

(a) 3 Bing. N. C. 183.
(b) 2 Price, 399.
(c) 4 M. & Selw. 486.

(d) 1 Cr. M. & R. 925.
(e) 2 Russ. 63.
(f) 10 B. & C. 17.

being tithe free, old rates made by the parish officers of B. on the occupiers of the land in question, and an account containing an overseer's account, in which, against the sum for which the occupier of that land had been assessed, there were crosses made, were held to be evidence, that the sums assessed had been paid by the tenants. Moreover, the map annexed is made evidence by the 64th section of the 6 & 7 Will. 4, c. 71. [*Maule, J.*—That is as between the parties themselves, but not as between third parties.] The 7 Will. 4 & 1 Vict. c. 69, followed by the 2 & 3 Vict. c. 62, which was amended by the 3 & 4 Vict. c. 15, enables the tithe commissioners to set out new boundaries of parishes. This question was discussed in the case of *In re Dent* (a). [*Coleridge, J.*—How would these documents be evidence that the place in question was in the county of Norfolk, the evidence would merely shew that the place was not in Southtown, in the county of Suffolk.] They would form a step in the evidence.

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Palmer, in reply, was stopped by the Court; who intimated that they would hear him on a future occasion, if they should find it necessary to do so.

Cur. adv. vult.

The judgment of the Court was now delivered by

COLERIDGE, J.—The decision of this case depends upon the admissibility of two documents, which were tendered in evidence at the trial and received after objection made. If either was inadmissible, a venire de novo may be awarded.

The issues joined on the pleas were, first, that the defendants did not take the goods modo et formâ; secondly, that they took them in the parish of Gorleston in Southtown, in Suffolk, absque hoc, that they took them in Norfolk. To this plea, in order to have a return of the goods replevied,

(a) 8 Q. B. 43.

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an avowry was added, that the goods were taken by the defendants as overseers of the parish of Gorleston in that town, under the authority of the 43 Eliz. The plaintiffs sought to prove that the goods were taken in Norfolk, tenanted by the defendant, and produced evidence a map. [His Lordship read the description of the goods given at the commencement of the report, and proposed the following question:—One question argued before us was, whether this map was taken from the proper custody. In one sense it did, for it was produced by a gentleman who bought it twelve years ago. But the fact of its being in the custody of the party who produced such lawful possession of it, does not at all vouch for its authenticity, nor that it is what it professes to be. It is wholly unlike the case of a deed purporting to be a conveyance of land. If such a deed is found in the custody of the party, who, if it were such conveyance, would have produced it to it, and kept amongst his title deeds, such custody would tend to shew that it is what it professes to be. But this argument does not apply here. The custody, therefore, of the map tends to shew that the map was what it professes to be, assuming it to be what the inscription upon it declares it to be, a map prepared in 1766, in part from an old map in 1736, by Joshua and William Kirby, sons of John Kirby, who made a survey in 1736, at the time of which there was only a declaration by Joshua and William, that they believed the boundaries to be as described by them, and that they were as described by them. What circumstances were given in evidence to render such declaration admissible? The relation of Joshua and William to John Kirby would not have that effect. They do not appear to have

Davies v. Lowndes (a). We think, therefore, that this map was inadmissible.

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The second question arose on the admission of a tithe apportionment with the map referred to in it and annexed to it. The former confirmed, and both signed and sealed, by the tithe commissioners. This question is attended with some difficulty, and we have not come to any clear opinion on it; if by deciding it now we should have rendered assistance to the learned Judge who may have to try the issue, we should have felt it right to do so; but as upon our decision new facts would, probably, be added, and a new question presented, we have not thought it necessary to express our opinion; the bill of exceptions leaves the case at present, as to facts on which the decision might turn, by no means clear.

There must be a venire de novo.

Venire de novo.

(a) 6 M & Gr. 527.

MEMORANDUM.

DURING this Vacation, *P. Erle* of the Middle Temple; *E. B. Denison*, of Lincoln's Inn, Esqrs., Barristers-at-law, were appointed her Majesty's Counsel; and *R. P. Collier*, and *T. Phinn*, of the Inner Temple, Esqrs., Barristers-at-law, received patents of precedence, and in the following Michaelmas Term took their seats within the bar accordingly.

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MICHAELMAS VACATION, 18 VICT.

IT IS ORDERED, That the practice to be observed in the superior Courts of Common Law at Westminster, with respect to the matters hereinafter mentioned, shall be as follows; that to say,

1. The provisions as to Pleadings and Practice contained in the Common Law Procedure Act, 1852, and the Rules of Practice of the superior Courts of Common Law made the 11th January 1853, and also the Rules of Pleading which came into operation on the first day of Trinity, 1853, so far as the same are or may be made applicable, shall extend and apply to all proceedings to be had or taken under the Common Law Procedure Act, 1854

2. Every affidavit to be hereafter used in any cause or civil proceeding in any of the said superior Courts of Common Law shall be drawn up in the first person, and shall be divided in paragraphs, and every paragraph shall be numbered consecutively, and, as nearly as may be, shall be confined to a distinct portion of the subject. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from the rule. This rule not to be in force till the first day of Easter Term next.

CAMPBELL.
 JOHN JERVIS.
 FRED. POLLOCK.
 J. PARKE.
 E. H. ALDERSON.
 C. CRESSWELL.
 W. ERLE.
 SAM'L. MARTIN.
 CHARLES CROMPTON.
 R. B. CROWDER.

27th November, 1854.

FORMS OF PROCEEDINGS.

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The forms of proceedings contained in the Schedule hereunder may be used in the cases to which they are applicable, with such alterations as the nature of the action, the description of the Court in which the action is depending, the character of the parties, or the circumstances of the case may render necessary; but any variance therefrom, not being in matter of substance, shall not affect their validity or regularity.

SCHEDULE.

1. *Issue of Fact to be tried by a Judge without a Jury.*

[*Proceed as in an issue to be tried by a jury as in ordinary cases, until the joinder of issue, and then thus:*] And the parties aforesaid having, by consent in writing duly signed, left the decision of the said issue [or "issues"] to the Court, it was on the — day of — 18— (*date of rule or order for allowance of trial*), by a rule of this Court [or "by an order of the Honourable Sir — knight, one of her Majesty's Justices of her Court of Queen's Bench [or "Common Pleas," or "one of the Barons of her Majesty's Court of Exchequer," as the case may be] Ordered that such trial should be allowed; therefore let the same be had accordingly.

2. *Subpœna thereon and in other Cases.*

[*The same as the form now in use, but in all cases omit the words "by a jury."*]

3. *Nisi Prius Record therein.*

[*The same as the form already directed by Rule of Hilary Term, 1853.*]

4. *Postea therein, on a Verdict for Plaintiff on all the Issues, where the Cause is tried in London or Middlesex, and where the Defendant appears at the Trial.*

Afterwards, on the — day of — 18— (*the first day of the sittings or the day of the trial*) at the Guildhall of the city of

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London [or "at Westminster Hall in the county of Middlesex"] before Sir — knight, one of her Majesty's Justices of her Court of Queen's Bench [or "Common Pleas," or "one of the Barons of her Majesty's Court of Exchequer," *as the case may be*; or if tried before the Chief Justice or Chief Baron state the fact, as in the prescribed form of *postea* on a trial before a jury. If tried before two Judges state the names of both, and of the Court of which they are Judges], come the parties within mentioned, by their respective attornies within mentioned, for the trial of the said issue [or "issues"], and the said Judge [or "Baron," or "Chief Justice," or "Chief Baron," *as the case may be*] decides the said issue [or "each of the said issues"] in favour of the plaintiff [or the decision may be stated in the affirmative or negative words of the issue, as, for example, thus: "And the said Judge [or "Baron"] as to the first issue within joined decides that the defendant did promise as within alleged; and as to the second issue within joined the said Judge [or "Baron"] decides that the defendant did not satisfy and discharge the plaintiff's claim by payment, as within alleged:"] And the said Judge [or "Baron"] assesses the damages of the plaintiff, on occasion of the premises within complained of, over and above his costs of suit, to £ — [omit the assessment of damages if none made]: Therefore, &c.

5. *The like, where the Trial was at the Assizes.*

Afterwards, on the — day of — 18 — (*the commission day of the assizes*) at — in the county [or "city"] of —, the assizes there holden in and for the said county [or "city"] before Sir — knight, one of her Majesty's Justices of her Court of — [or "one of the Barons of her Majesty's Court of the Exchequer," *as the case may be*], come the parties, &c. [conclude in the preceding form.]

6. *The like, where one Issue is found for the Plaintiff and another for the Defendant, the latter going to the whole Action.*

[Proceed as in the preceding forms of *postea* to the statement of the appearance of the parties at the trial, and then thus:] And the said Judge [or "Baron," or "Chief Justice," or "Chief Baron," *as the case may be*] decides the first issue within joined in favour of the plaintiff; and he decides the second issue within joined in

the defendant [*as the case may be ; or the decision may be in the affirmative or negative of each issue, as directed in the form*]: Therefore, &c.

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7. *Judgment thereon for Plaintiff.*

the issue, and then proceed thus:] Afterwards, on the of — 18— (day of signing final judgment) come the messaid, by their respective attornies aforesaid, and Sir John, one of her Majesty's Justices of her Court of — of the Barons of her Majesty's Court of Exchequer," as may be; or if tried before the Chief Justice or Chief Baron, act as in the prescribed form of postea in a trial before a judge tried before two Judges state the names of both, and out of which they are Judges], by whom the said issue "issues were"] tried hath [or "have"] sent hither their"] record had before him [or "them"] in these Afterwards, &c. [copy the postea]: Therefore it is content that the said plaintiff do recover against the defendant monies by the said Judge [or "Baron," or "Chief Justice," or "Chief Baron," as the case may be,] so assessed, and his costs of suit.

margin of the roll, opposite the words, " Therefore it is so," write " Judgment signed the — day of — A.D. ending the day of signing the judgment.]

8. *Execution thereon.*

the same as in ordinary cases.]

Writs of Execution where the Court or a Judge decides in Matters of Account.

the same as in ordinary cases of execution on a judgment, but instead of the writ stating the money to be levied as herein recovered by a judgment, and omitting the direction of interest, say " £——, which by a rule of our Court of Bench [or "Common Pleas," or "by an order of Sir John, one of our Justices of our Court of Queen's Bench on Pleas," or "one of the Barons of our Exchequer," as may be], dated the — day of — 18—, made in pursuance of the 3rd section of "The Common Law Procedure

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Act, 1854," in an action commenced in our said Court at the suit of *A. B.* [or "the said *A. B.*" if before men against the said *C. D.*, was ordered to be paid by the said to the said *A. B.* [as the case may be, following the terms stance of the rule or order]. [If costs were ordered to be paid the direction to levy them may be thus: "together with costs in the said rule [or "order"] mentioned, which said were afterwards, on the — day of — 18—, taxed allowed by our said Court of — at £ —]. [If the order directs that interest shall be paid, then the direction it may be thus: "together also with interest on the said £ — at the rate of £ — per cent. from the said — 18—" as the case may be, according to the rule or o

10. *Writs of Execution where Matter of Account is :
 to and decided on by an Arbitrator, Officer of the County Court Judge.*

[The same as directed in the preceding form, but instead stating the levy to be of money ordered by a rule or order paid, say, "£ —, which by an award [or "certified dated the — day of — 18— (date of award or certified made by *E. F.* esquire, an arbitrator appointed by the [or "by *E. F.* esquire, one of the Masters (or other officer ing his office) of our Court of —," or "by *E. F.* esquire Judge of the County Court of —," as the case may be] pursuant to the 3rd section of "The Common Law Procedure Act, 1854," was awarded [or "certified"] to be due and payable to the said *C. D.* to ["the said"] *A. B.*

11. *Special Case for the Opinion of the Court under Section of the Common Law Procedure Act, 1854, where the Allowance or Disallowance of a particular Item or Items depends on a Question of Law.*

In the Queen's Bench ["Common Pleas" or "Exchequer

Between { *A. B.*, Plaintiff
 and
C. D., Defendant.

The following case is stated for the opinion of the Court as a rule of the Court [or "order of the Honourable Mr.

—” or “Baron ——”], dated the — day of — 18—, made pursuant to the 4th section of “The Common Law Procedure Act, 1854.” [*Here state the material facts of the case bearing upon the question of law to be decided.*]

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The question [or “questions”] for the opinion of the Court is [or “are”]:

First—Whether, [&c.]

Second—Whether, [&c.]

12. *Issue to be tried by a Jury where the Court or a Judge has directed it, under Section 4, where the Allowance or Disallowance of a particular Item or Items depends on a Question of Fact.*

In the Queen’s Bench [or “Common Pleas,” or “Exchequer of Pleas”].

The — day of — 18— (*date of issue when delivered by the plaintiff*).

[*Venue.*] A. B. by — his attorney sues C. D., and the plaintiff [or “defendant”] affirms, and the defendant [or “plaintiff”] denies, that, &c. [*Here state the question of fact to be tried as directed by the Court or Judge. In some cases it may be advisable to state an inducement before stating the question in dispute.*] [*If there be more than one question to be decided, state it thus: “and the said plaintiff [or “defendant”] also affirms, and the defendant [or “plaintiff”] also denies, that, &c.”*] And it has been ordered by the Court [or “by the Honourable Mr. Justice — or “Baron ——”] that the said question [or “questions”] shall be tried by a jury; therefore let the same be tried accordingly.

13. *Postea thereon.*

[*The same as in ordinary cases, except that there is no assessment of damages.*]

14. *Special Case stated by an Arbitrator under Sect. 5 of the Common Law Procedure Act, 1854.*

[*In the special case the arbitrator must state whether the arbitration is under a compulsory reference under the Act, or whether*

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it is upon a reference by consent of the parties where the submission has been or is to be made a rule or order of one of the superior Courts of Law or Equity at Westminster. In the former case, the award must be intitled in the Court and cause, and the rule or order of the Court must be set forth. In the latter case, the terms of the reference relating to the submission being made a rule or order of Court must be set forth.]

15. *Judgment thereon when a Judgment has been ordered.*

[*Copy the special case, and then proceed thus:*] Afterwards, on the — day of —, 18—, come here the parties aforesaid, and the Court is of opinion that [*state the opinion of the Court on the question or questions stated in the case, in the affirmative or negative, as the case may be.*] Therefore it is considered that the plaintiff do recover against the defendant the said £— and £— for his costs of suit.

[*In the margin, opposite the words, "Therefore it is considered, &c." write "Judgment signed the — day of —, 18—," inserting the day of signing final judgment.*]

16. *Postea, where the Judge upon the Trial of an Issue in Fact before him under Sect 1 directs an Arbitration as to Part of the Claim under Sect. 6 of the Common Law Procedure Act, 1854.*

[*Proceed as in the above prescribed form of postea No. 4 or 5, as the case may be, to the statement of the appearance of the parties at the trial inclusive, and then proceed thus:*] And as to the plaintiff's claim in the — count of the declaration within mentioned [*as the case may be*], it appears to the said Judge [*or "Baron"*] that the questions arising thereon involve matter of account which cannot conveniently be tried before him; and hereupon the said Judge [*or "Baron"*] orders that the plaintiff's claim in the said — count of the declaration mentioned be referred to *E. F.*, of —, esquire, an arbitrator appointed by the said parties [*or "to E. F., esquire, being one of the Masters of the Court of Queen's Bench," or "Common Pleas," or "Exchequer of Pleas," (or other officer of the Court, stating his office), or "to E. F., esquire, being the Judge of the County Court of —, upon the terms, that &c. [set forth the*

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terms of the order], and the said Judge [or "Baron"] decides each of the said issues, except those relating to the said — count of the declaration, in favour of the plaintiff [*or the statement of the decision may be in the affirmative or negative words of the issue, as, for example, thus:* "And the said Judge [or "Baron"] as to the first issue within joined decides that the defendant is guilty as within in the — count of the declaration alleged; and as to the second issue within joined the said Judge [or "Baron"] decides that the defendant did not commit the acts within in the — count of the declaration alleged by the plaintiff's leave."] And the said Judge [or "Baron"] assesses the damages of the plaintiff on occasion of the premises within in the — count of the declaration complained of, over and above his costs of suit, to £—. [*Omit the assessment of damages, if none made.*] Therefore, &c.

11. *Writ of Habere Facias Possessionem on a Rule to deliver Possession of Land pursuant to an Award.*

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of —, greeting. We command you that you omit not by reason of any liberty of your county, but that you enter the same, and without delay you cause *A. B.* to have possession of — [*here describe the lands and tenements as in the rule for the delivery of possession*], and which lands and tenements by a rule of our Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas,"] dated the — day of —, 18—, made pursuant to the 16th section of "The Common Law Procedure Act, 1854," *E. F.* (*the party named in the rule*) was ordered to deliver possession to the said *A. B.*; and in what manner you have executed this our writ make appear to us [*or in Common Pleas, "to our Justices," or in Exchequer, "to the Barons of our Exchequer"*] at Westminster, immediately after the execution hereof, and have you there then this writ. Witness — at Westminster, the — day of — in the year of our Lord —.

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18. *Judgment for the Plaintiff on a Special Case stated
 Section 32 of the Common Procedure Act, 1854.*

[*Copy the special case, and then proceed thus:*] After — come here the parties aforesaid by their respective attorneys aforesaid, and the Court is of opinion that, &c. *opinion of the Court on the question or questions stated in the special case.*] Therefore it is considered that the plaintiff is entitled against the defendant the said £— and £— for costs of suit.

[*In the margin, opposite the words "Therefore it is considered, &c.," write "Judgment signed the — day of — 18—," inserting the day of signing final judgment.*]

19. *Judgment of Affirmance by Court of Error in the Exchequer Chamber on a Special Case.*

[*Copy to the end of the judgment on the roll in the cause, and then proceed thus:*] Afterwards, on — (*the day of the entry of the note of error*) the defendant [*or "plaintiff"*] delivered to the Masters of the Court here a memorandum in the form required by and according to the statute in that behalf made and provided, alleging that there was error in the record and proceedings aforesaid; and afterwards, on *the day of making the entry of the suggestion on the roll* the defendant [*or "plaintiff"*] said that there was no error in the record and proceedings aforesaid. And thereupon afterwards, on — (*the day of giving notice of the suggestion in the Exchequer Chamber*), in the Court of Exchequer before our Lady the Queen before the Justices of the Common Bench of our said Lady the Queen and the Barons of the Exchequer, [*or, if the error be on a judgment of Common Bench, "before the Justices of our Lady the Queen assigned to hold pleas in the Court of our said Lady the Queen herself and the Barons of her Exchequer," or, if the error be on a judgment of the Exchequer, say "before the Justices of our Lady the Queen assigned to hold pleas in the Court of our said Lady the Queen before the Queen herself and the Barons of the Common Bench of our said Lady the Queen,"*] according to the plaintiff as the defendant by their respective attorneys aforesaid,* and it appears to the said Court of Error in the Exchequer Chamber that there is no error in the record and

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ing aforesaid, or in giving the judgment aforesaid: Therefore it is considered by the said Court of Error that the judgment aforesaid be in all things affirmed, and stand in full force and effect, the said causes above for error suggested in anywise notwithstanding: And it is further considered by the same Court, that the said plaintiff do recover against the defendant £—— for his damages and costs which he had sustained and expended by reason of the delay of execution of the judgment aforesaid, on pretence of the prosecution of the said proceedings in error, and that the plaintiff have execution thereof.

20. *Judgment of Reversal in the like Case.*

[*The same as the preceding form to the asterisk*, and then thus:*] And it appears to the said Court of Error that there is manifest error in the record and proceedings aforesaid, and in giving the judgment aforesaid: Therefore it is considered by the said Court of Error, that the judgment aforesaid for the errors aforesaid be reversed, annulled, and altogether holden for naught; and that the said defendant be restored to all things which he hath lost by occasion of the said judgment, &c.

21. *Judgment of Court of Appeal in Exchequer Chamber on a Disposal of the Appeal in the Plaintiff's Favour where Judgment for him had been given in the Court below, under the 41st and 42nd Sections of the Common Law Procedure Act, 1854.*

[*Copy the case for the appeal as stated by the parties, and then proceed thus:*] Afterwards, on —— (*the day of giving judgment of Court of Appeal*), in the Court of Exchequer Chamber of our Lady the Queen before the Justices of the Common Bench of our Lady the Queen and the Barons of her Exchequer, [*or, if the appeal be from the Common Pleas, say, "before the Justices of our Lady the Queen assigned to hold pleas in the Court of our Lady the Queen before the Queen herself and the Barons of her Exchequer," or, if the appeal be from the Exchequer, say, "before the Justices of our Lady the Queen assigned to hold pleas in the Court of our Lady the Queen before the Queen herself and the Justices of the Common Bench of our said Lady the Queen,"*] come the parties aforesaid by their respective attornies

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aforesaid; and the said Court of Appeal decide that, &c. *the decision of the Court upon the questions raised by the appeal*]; and it is considered by the said Court of Appeal the plaintiff do recover against the defendant £—— for costs which the plaintiff hath sustained and expended in said appeal, and that the plaintiff have execution thereof.

22. *Fi. fa. against a Garnishee, under the 63rd Section of Common Law Procedure Act, 1854, where Debt not discharged or Garnishee does not appear.*

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to Sheriff of ——, greeting. We command you that you omit by reason of any liberty of your county, but that you enter same, and of the goods and chattels of *E.F.* in your bailiwick you cause to be levied £——, being the amount of [or “*pay the amount of,*” *if the debt be more than the judgment debt due from the said E.F. to C.D., heretofore attached in the hands of the said E.F. by an order of Sir —— knight, or our Justices of our Court of Queen’s Bench [or “one of our Justices of our Court of Common Pleas,” or “one of the Barons of our Exchequer”], dated —— [date of order], pursuant to statute in such case made, to satisfy [or, if the debt be less than the judgment debt, say, “towards satisfying”] £——, which A. B. lately in our Court of Queen’s Bench [or “Court of Common Pleas,” or “Exchequer of Pleas”] recovered against the said C.D., whereof the said C.D. is convicted; and that you have the sum of £—— before us, [or, in Common Pleas, “before our Justices,” or, in Exchequer, “before the Barons of our Exchequer,” as the case may be,] at Westminster, immediately after the execution hereof, to be rendered to the said A. B. —— in satisfaction as aforesaid, that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us [or, in the Common Pleas, our Justices,” or, in the Exchequer, “to the Barons of our Exchequer,” as the case may be,] at Westminster, immediately after the execution hereof, and have you there then this writ. Witness —— at Westminster, the —— day of —— in the year of our Lord ——.*

23. *Ca. sa. in the like Case.*

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of —, greeting. We command you that you omit not by reason of any liberty in your county, but that you enter the same, and take *E. F.*, if he be found in your bailiwick, and him safely keep, so that you may have his body before us [*or, in Common Pleas, "before our Justices," or, in Exchequer, "before the Barons of our Exchequer,"*] at Westminster immediately after the execution hereof, to satisfy *A. B. £—*, being the amount [*or "part of the amount," if the debt be more than the judgment debt,*] of a debt due from the said *E. F.* to *C. D.*, heretofore attached in the hands of the said *E. F.* by an order of Sir — knight, one of our Justices of our Court of Queen's Bench [*or "one of our Justices of our Court of Common Pleas," or "one of our Barons of the Exchequer,"*] dated — (*date of order*) pursuant to the statute in such case made and provided, to satisfy [*or "towards satisfying," if the debt be less than the judgment debt,*] *£—*, which the said *A. B.* lately in our said Court of Queen's Bench [*or "Common Pleas" or "Exchequer of Pleas," as the case may be*] recovered against the said *C. D.*, whereof the said *C. D.* is convicted, and have you there then this writ. Witness — at Westminster, the — day of — in the year of our Lord —.

24. *Writ against Garnishee to show Cause why the Judgment Creditor should not have Execution against him for the Debt disputed by him.*

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to *E. F.*, greeting. We command you that within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas,"*] to show cause why *A. B.* should not have execution against you for *£—*, being the amount [*or "part of the amount," if the debt exceeds the judgment debt,*] of a debt due from you to *C. D.* to satisfy [*or "towards satisfying," if the debt be less than the judgment debt,*] *£—*

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which on the — day of — 18—, (*date of judgment*) said *A.B.* by a judgment of our Court of Queen's Bench "Common Pleas," or "Exchequer of Pleas," recovered against the said *C.D.*, and for costs of suit in this behalf; and notice, that in default of your so doing the said *A.B.* may proceed to execution. Witness — at Westminster, the — of — in the year of our Lord —.

[*The following indorsements must be made on the writ:*] writ was issued by *P.A.* [*plaintiff's attorney's name in full*] — [*place of his abode in full*; also if sued out as agent of attorney in the country, here say, "as agent for *A.A.* of — attorney for the said *A.B.* [*or if sued out by the plaintiff's son*, "This writ was issued in person by the plaintiff named, who resides at —," mentioning the city, town, or place and also the name of the hamlet, street, and number of the plaintiff's residence, if any such there be.]

The plaintiff claims £— [*the amount of the debt due from the garnishee*] and £— for costs, and if the amount of to be paid to the plaintiff or his attorney within four days of the service hereof, further proceedings will be stayed.

[*Within three days after the service fill up the following indorsement:*] This writ was served by me *X.Y.* on *C.D.* on the day of — 18—.

25. Declaration thereon.

In the Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas."*]

The — day of — A.D. —.

— (*Venue*).—*A.B.* by — his attorney [*or "in person"* *E.F.* by a writ issued forth of this Court, in these words: *Victoria, &c.* [*copy the writ*], and the said *E.F.* has appeared to the said writ, and the said *A.B.* by his attorney aforesaid that the said debt due from the said *E.F.* to the said *C.D.* &c. [*here state the debt as in a declaration in ordinary cause*] and the said *A.B.* prays that execution may be adjudged to be done accordingly for the said £— and for costs of suit in this behalf.

26. *Plea thereto.*

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."]

The — day of — A.D. —.

E.F. } The said *E.F.* by — his attorney says, that he never
as *A.B.* } was indebted to the said *C.D.* as alleged [or plead
such other defence or several defences as in other cases].

27. *Issue thereon.*

[Copy the declaration and pleadings, and conclude thus:]
Therefore let a jury come, &c.

28. *Postea thereon.*

[The same as in ordinary cases, omitting the assessment of Damages.]

29. *Judgment for Plaintiff therein.*

[The same as in ordinary cases to the statement of the judgment, which may be thus: "Therefore it is considered that the said *A. B.* have execution against the said *E. F.* for the said £— the amount [or "part of the amount"] of the said debt due from him to the said *C. D.*, to satisfy [or "towards satisfying," if the debt be less than the judgment debt,] the said £—, which the said *A. B.* on the said — day of — 18— [date of judgment against judgment debtor] by the judgment of this Court recovered against the said *C. D.*; and it is further considered that the said *A. B.* do recover against the said *E. F.* £— for his costs of suit in this behalf.

30. *Fi. fa. therein.*

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of —, greeting. We command you that you omit not by reason of any liberty of your county, but that you enter the

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same, and of the goods and chattels of *E. F.* in your
you cause to be made £—— the amount [or “*part*
amount,” *if the debt be more than the judgment debt,*]
due from the said *E. F.* to *C. D.*, to satisfy [or “*to satisfy*,”
if the debt be less than the judgment debt,] £—
A. B. on the —— day —— 18—— [*date of judgment*
judgment debtor] by the judgment of our Court of
Bench [or “*Common Pleas,*” or “*Exchequer of P*
covered against the said *C. D.*, and whereupon it has
judged by our said Court that the said *A. B.* should
cution against the said *E. F.* for the said £——, and a
which in our same Court were adjudged to the said
his costs of suit which he hath been put to on occas
writ sued out against the said *E. F.* at the suit of the
in that behalf, whereof the said *E. F.* is convicted,
the said monies before us [or, *in Common Pleas,* “*Justices,*” or, *in the Exchequer,* “*before the Barons of o*
quer,”] at Westminster, immediately after the executi
to be rendered to the said *A. B.*, and that you do all s
as by the statute passed in the second year of our reig
authorised and required to do in this behalf; and in v
ner you shall have executed this our writ make ap[
[or, *in the Common Pleas,* “*to our Justices,*” or, *in the i*
“*to the Barons of our Exchequer,*” *as the case may be*]
minster, immediately after the execution hereof, and
there then this writ. Witness —— at Westminster,
day of —— in the year of our Lord ——.

31. *Ca. sa. therein.*

Victoria, by the Grace of God of the United Ki
Great Britain and Ireland Queen, Defender of the Fa
Sheriff of ——, greeting. We command you that you
by reason of any liberty of your county, but that you
same, and take *E. F.* if he shall be found in your
and him safely keep, so that you may have his body
[or, *in the Common Pleas,* “*before our Justices,*” or, *i*
chequer, “*before the Barons of our Exchequer,*” *as the*
be] at Westminster, immediately after the execution
satisfy *A. B.* £—— the amount [or “*part of the a*
the debt be more than the judgment debt,] of a debt due

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said *E. F.* to *C. D.*, and for the levying of which it has been adjudged by our Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas,"] that the said *A. B.* should have his execution against the said *E. F.*, to satisfy [or "towards satisfying," if the debt be less than the judgment debt,] £—— which the said *A. B.* on —— (the date of the judgment against the judgment debtor) by the judgment of the said Court recovered against the said *C. D.*, and further to satisfy the said *A. B.* £——, which in our same Court were adjudged to the said *A. B.* for his costs of suit which he hath been put to on occasion of our writ sued out against the said *E. F.* at the suit of the said *A. B.* in that behalf, whereof the said *E. F.* is convicted; and have you there then this writ. Witness —— at Westminster, the —— day of —— in the year of our Lord.

32. *Judgment for Plaintiff after Verdict that a Mandamus do issue, under Section 71 of the Common Law Procedure Act, 1854.*

[The same as in the ordinary form of an entry of a judgment to the end of the postea, and then thus:] Therefore it is considered that a writ of mandamus do issue commanding the defendant to [here state the duty to be performed, or the thing to be done, as claimed by the declaration; and it is also considered that the plaintiff do recover of the defendant the said monies by the Justices [or "by the Judge" or "Baron"] aforesaid in form aforesaid above assessed, and also £—— for his costs of suit in this behalf.

[In the margin of the judgment opposite the first words, "Therefore it is considered &c.," write "judgment signed the —— day of —— 18——," inserting the day of signing final judgment.]

33. *Writ of Inquiry to ascertain the Expense incurred by the doing of an Act, and for the doing of which a Mandamus was issued.*

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of —— greeting. Whereas, upon an application by *A. B.*, the plaintiff in an action against *C. D.* in our Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas,"

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as the case may be,] at Westminster, our said Court did on — day of — A.D. (*date of order*) direct that — [*the terms of the order directing the act to be done at the defendants expense*]; and the said A. B. [*or "and E. F.," if another person than the plaintiff has been appointed by the Court to do the act*] has done the said act so directed to be done; and in order to enable our said Court to ascertain the amount of the expense of the doing the same, we command you, that by the oath of twelve good and lawful men of your bailiwick you diligently inquire what is the amount of the expenses incurred by the said A. B. [*or "by E. F.," as the case may be,*] in the doing of the said act, and that you send to us [*or in Common Pleas, "to the Justices," or in Exchequer "to the Barons of our Exchequer"*] at Westminster, on the — day of — now next ensuing, the inquisition which you shall thereupon take, under your seal and the seal of those by whose oath you shall take that inquisition together with this writ. Witness — (*name of Chief Justice, or in Exchequer of Chief Baron*) at Westminster, the — day — in the year of our Lord —.

34. *Writ of Execution in Detinue, under Section 78 of Common Law Procedure Act, 1854, for the Return of Chattel detained, and for a Distringas until returned, or rate from a Writ for Damages or Costs.*

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to Sheriff of — greeting. We command you, that you omit by reason of any liberty of your county, but that you enter same, and without delay you cause the following chattels, *is to say, [here enumerate the chattels recovered by the judgment for the return of which execution has been ordered to issue,]* to be returned to A. B., which the said A. B. lately in our Court before us [*or in the Common Pleas, "before our Justices," or in Exchequer "before the Barons of our Exchequer,"*] at Westminster recovered against C. D. in an action for the detention of the same, whereof the said C. D. is convicted.* And we further command you, that if the said chattels cannot be found in your bailiwick you omit not by reason of any liberty of your county, but that you enter the same, and distrain the said C. by all his lands and chattels in your bailiwick, so that nei-

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the said *C. D.* nor any one for him do lay hands on the same until the said *C. D.* render to the said *A. B.* the said chattels; and in what manner you shall have executed this our writ make appear to us [*or in Common Pleas* "to our Justices," *or in Exchequer* "to the Barons of our Exchequer,"] at Westminster, immediately after the execution hereof, and have you there then this writ. Witness — at Westminster, the — day of — in the year of our Lord —.

35. *The like, but instead of a Distress until the Chattel is returned, commanding the Sheriff to levy on Defendant's Goods the assessed Value of it.*

[*Proceed as in the preceding form until the*, and then thus:*] And we further command you, that if the said chattels cannot be found in your bailiwick you omit not by reason of any liberty of your county, but that you enter the same, and of the goods and chattels of the said *C. D.* in your bailiwick you cause to be made £—— (*the assessed value of the chattels*), whereof the said *C. D.* is also convicted; and that in the execution of this our last-mentioned command you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf; and in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "to our Justices" *or in the Exchequer* "to the Barons of our Exchequer," *as the case may be,*] at Westminster, immediately after the execution hereof, and have you there then this writ. Witness — at Westminster, the — day of — in the year of our Lord —.

36. *Indorsement on Writ of Summons of Claim of a Writ of Injunction under Section 79 of the Common Law Procedure Act, 1854.*

The plaintiff intends to claim a writ of injunction to restrain the defendant from — [*here state concisely for what the writ of injunction is required, as, for example, thus—*" felling or cutting down any timber or trees standing, growing, or being in or upon the land and premises at — in the county of —, and from committing any further or other waste or spoil in or upon

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the said land and premises."] And take notice, that, in def
of the defendant's entering an appearance as within comman
the plaintiff may, besides proceeding to judgment and execu
for damages and costs, apply for and obtain such writ.

CAMPBELL.
JOHN JERVIS.
FRED. POLLOCK.
J. PARKE.
E. H. ALDERSON
C. CRESSWELL.
W. ERLE.
SAM'L. MARTIN.
CHARLES CROMPTON.
R. B. CROWDER.

27th November, 1854.

Exchequer Reports.

MICHAELMAS TERM, 18 VICT.

BROADWOOD & Others *v.* GRANARA.

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Nov. 15.

THIS was a case stated for the opinion of the Court by consent of the plaintiffs and defendant, and by order of a Judge.

The declaration stated that the defendant converted to his own use the plaintiffs' goods, that is to say, a boudoir grand pianoforte. The defendant pleaded, first, not guilty; secondly, that the goods were not the plaintiffs. Upon which, issues were joined.

The plaintiffs are, and at the time of the alleged conversion were, in partnership as manufacturers of pianofortes, in Great Pulteney-street, London. The defendant was, and is, the proprietor of an inn or hotel, called the Hotel de l'Europe, in Leicester-place, Leicester-square.

In March, 1853, a Monsieur Hababier, a foreigner and professional pianist, went to reside at the defendant's hotel, and remained there, occupying apartments, and occasionally taking his meals in the house, for some months. On the 28th of March, Monsieur Hababier, then residing at the hotel, as before mentioned, went to the manufactory of the plaintiffs in Great Pulteney-street, and requested the use or loan of a grand pianoforte. It has been, and is, usual for the plaintiffs to lend pianofortes to musical artists without charge; and in compliance with this request a grand piano-

B. lent a pianoforte to a professional pianist whilst staying as a guest at an inn, the inn-keeper well-knowing that the pianoforte was the property of B.:—*Held*, that the inn-keeper had no lien on the pianoforte for the bill due from his guest.

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forte was sent to the before-mentioned hotel for the use of Monsieur Hababier. This pianoforte remained at the hotel in possession of Monsieur Hababier, in his apartments, until the 9th of June following, when it was taken away and replaced by a boudoir grand pianoforte, also supplied by the plaintiffs without charge to Monsieur Hababier.

Monsieur Hababier remained at the hotel until the 27th of June, and during that time incurred a bill for the use of the apartments and for board, hire of carriages, and other accommodation, to a considerable amount. Some payments were made on account, but at the time of the demand and refusal hereinafter mentioned, there was a balance due from him to the defendant of 46*l.* 3*s.* 5*d.*, consisting in part of use of apartments, &c. after the 9th of June.

On the 27th of June, the plaintiffs' clerk applied to the defendant for the last-mentioned pianoforte, and requested that it might be delivered to him for the plaintiffs. At the same time, handed to the defendant a written authority from Monsieur Hababier to deliver it to the plaintiffs. The defendant declined to deliver up the pianoforte. On the following day, the clerk again went to the house of the defendant, taking with him a van and porters, and again demanded the pianoforte. On this occasion, the defendant asked him if he had brought money, and being answered in the negative, said, "Unless Messrs. Broadwood pay my bill for the rent of the apartments, I will not give up the piano."

It is admitted, for the purposes of this case, that the house of the defendant was, and is, an inn; and that the defendant was, and is, entitled to the rights of an innkeeper.

The defendant, at all times, knew the pianoforte in question was not the property of Monsieur Hababier, but that of the plaintiffs; and the plaintiffs at all times knew that the said Monsieur Hababier was stopping at an hotel. The balance due to the defendant from Monsieur Hababier is still unpaid.

The question for the opinion of the Court is, whether, under the above circumstances, the plaintiffs are entitled to maintain the action. If the Court shall be of opinion that the action is maintainable, the verdict is to be entered for the plaintiffs, with 100*l.* damages. If the Court shall be of opinion that the defendant had a right to detain the pianoforte, then the verdict is to be entered for the defendant.

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Watson for the plaintiffs.—This case does not fall within the law relating to innkeepers. The lien of an innkeeper arises out of his obligation to receive guests and their goods. But his rights and liabilities are only in respect of *travellers*, and the goods which they *bring with them* to the inn. In *Calye's case* (a), "it was resolved, per totam Curiam, that if a man comes to a common inn, and delivers his horse to the ostler, and requires him to put him to pasture, which is done accordingly, and the horse is stolen, the innholder shall not answer for it; for the words of the writ which lieth against the ostler are, cum secundum legem et consuetud' regni nostri Angliæ hospitatores qui hospitia com' tenent ad hospitandos homines per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes, eorum bona et catalla infra hospitia illa existentia absque subtractione seu amissione custodire die et nocte tenentur," &c. In this case, the guest was not a traveller, and the pianoforte was not brought to the inn by him as part of his goods, but was sent there by the plaintiffs, the defendant well knowing that it was the plaintiffs' property. No doubt, in some cases, the lien attaches on the goods of a third party; for instance, where a traveller brings to an inn the horse of another person, the innkeeper may detain it for its keep, and he is not bound to inquire who is the owner: *Yorke v. Grenaugh* (b). The same right of lien has been extended to the case of a car-

(a) 8 Rep. 32 a.

(b) 2 Ld. Raym. 866.

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riage: *Turrill v. Crawley* (a). But the principle of these decisions is, that the innkeeper is bound to receive the goods brought by his guest, and therefore the right is co-extensive with the duty. In *Sunbolf v. Alford* (b), Parke B., says, "There can be no doubt that an innkeeper has by law a lien upon the goods of his guest, and that is upon the ground that he is bound to receive him, and must have some means given him by which he may be enabled to work out payment of his debt." [Parke, B.] An innkeeper has a lien on such goods only as he is compelled to receive with his guest. Could he be indicted for not receiving a pianoforte? It might be a nuisance to persons in his house.] Though bankers have a general lien on securities of their customers, yet securities may come to their hands under circumstances which are inconsistent with such a lien: *Brandao v. Bennett* (c). Here the pianoforte was delivered to the defendant, with full knowledge that the guest had no authority to pledge it, and therefore no lien can be implied. The defendant was clearly not bound to find a room for a pianoforte, nor would he have been responsible if it had been lost: *Burgess v. Clements* (d).

Willes for the defendant.—It was essential that a guest, being a professional pianist, should have a pianoforte; and when the plaintiffs consented to this one being sent to the defendant's inn, he impliedly gave the defendant all the rights which an innkeeper has by law in respect of the goods of a stranger brought by a guest. [Parke, B.] If the law gives the defendant no lien, none can be presumed from the conduct of the plaintiffs. *Pollock, C. B.* Suppose a lady, while staying at an inn, hired a diamond necklace, and the innkeeper knew that it was not her property

(a) 13 Q. B. 197.

(b) 3 M. & W. 248.

(c) 3 C. B. 519.

(d) 4 M. & Sel. 306.

how could he have any lien upon it as the goods of guest brought by her when travelling? The innkeeper could not refuse to receive the necklace, and if it was lost he would be responsible. Suppose this pianoforte belonged to the guest, would not the defendant have a lien on it? [Parke, B.—It is not necessary to decide the point. Alderson, B.—I do not understand upon what principle an innkeeper can be bound to take in all the goods which may be sent to his guest at any time.] If a guest were travelling, an innkeeper could not refuse to receive his violin or violincello; and there is no difference in the case of a pianoforte. The custom of the realm that innkeepers should safely keep the goods of their guests extends to goods of a third person brought to the inn by his guest: *Beedle v. Morris* (a). So where a person took a horse of another, and sent him to a common inn, it is held that the innkeeper might detain the horse for its value, since he was compellable to keep it: *Robinson v. Bland* (b); 2 Roll. Abridg. "Inns" (A.) 25. And even where a horse of another has been wrongfully taken, the innkeeper has a lien for its keep, unless he has made himself guilty to the wrongful act: *Johnson v. Hill* (c). Indeed, the rights of an innkeeper were considered so extensive, until the decision in *Sunbolf v. Alford* (d), a notion was introduced, that an innkeeper might detain the person of a guest, or take off his clothes, as a security: Bac. Abridg. "Inns and Innkeepers" (D). As against an execution creditor, the lien extends to all goods supplied, and is not limited to a reasonable quantity: *Proctor v. Nicholson* (e). Assuming that the defendant was not bound to receive the pianoforte, yet having actually received it as part of the goods of his guest, the lien attaches. It is clear, that the landlord might have distrained the pianoforte for

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Cro. Jac. 224.
Pop. 127.
3 Stark. 172.

(d) 3 M. & W. 248.
(e) 7 Car. & P. 67.

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rent. [*Parke, B.*—That depends on a totally different principle. A landlord has a right to his rent out of issues of the land; and everything upon the land is, by common law, considered as part of the issues, and subject to the payment of rent. *Alderson, B.*—The piano was not brought to the inn by the guest, but was sent there by the plaintiffs, the defendant knowing that it was then; then how can it be said that the defendant received it as the goods of the guest? Therefore, assuming that an innkeeper has a right of lien on his guest's goods, which are at any time brought to the inn, that is not this case.]—It is also referred to *Rex v. Ivens (a)*.

Watson was not called upon to reply.

POLLOCK, C. B.—We are all of opinion that the lien claimed by the defendant cannot prevail. I need not go through the series of decisions referred to, or the propositions propounded at the bar, because the limited ground on which I think the plaintiffs entitled to judgment is this—that there is no case which decides that an innkeeper has a right of lien under such circumstances as these. This is the case of goods, not brought to the inn by a traveller as his goods, either upon his coming to or whilst staying at the inn, but they are goods furnished for his temporary use by a third person, and known by the innkeeper to belong to that person. I shall not inquire, whether, if the pianoforte had belonged to the guest, the defendant would have had a lien on it. It is not necessary to decide this point, for the case finds that it was known to the defendant that the pianoforte was not the property of the guest and that it was sent to him for a special purpose. Under these circumstances, I am clearly of opinion that the defendant has no lien.

(a) 7 Car. & P. 213.

PARKE, B.—I am of the same opinion. It is not necessary to advert to the decisions on the subject of an innkeeper's lien, because this is not the case of *goods brought by a guest to an inn* in that sense in which the innkeeper has a lien upon them; but it is the case of goods sent to the guest for a particular purpose, and known by the innkeeper to be the property of another person. It therefore seems to me that there is no pretence for saying that the defendant has any lien. The principle on which an innkeeper's lien depends is, that he is bound to receive travellers and the goods which they bring with them to the inn. Then, inasmuch as the effect of such lien is to give him a right to keep the goods of one person for the debt of another, the lien cannot be claimed except in respect of goods which, in performance of his duty to the public, he is bound to receive. The obligation to receive depends on his public profession. If he has only a stable for a horse he is not bound to receive a carriage. There was no ground whatever for saying that the defendant was under an obligation to receive this pianoforte.

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ALDERSON, B.—I am of the same opinion.

PLATT, B.—The case of *Johnson v. Hill* (a) shews the principle of law which is applicable to the present case. If a person brings the horse of another to an inn, the innkeeper may detain it from the owner until its keep is paid. But if, as the jury found in *Johnson v. Hill*, the innkeeper knew that the person bringing the horse illegally got possession of it, and therefore had no right to pledge it for his debt, then the lien does not attach. Here the plaintiffs send a pianoforte to the room of the guest, and the innkeeper well knew that it was not the property of the guest, and that it was not competent for him to pledge it for a

(a) 3 Stark. 172.

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debt of his own. Then, how can it be said that of the plaintiffs gave the defendant a right to pianoforte for his guest's debt? The plaintiffs not taken it away the next minute. The case does not within the principles of law relating to the li keepers.

Judgment for the p

Nov. 15.

MOORE v. SHEPHERD, Deputy-Master of THE HOUSE, DEPTFORD STROUD.

The Ramsgate Harbour Acts, 32 Geo. 3, c. 74, and 55 Geo. 3, c. lxxxiv., are local and personal Acts, within the meaning of the 5 & 6 Vict. c. 97; and therefore the period of limitation of actions for anything done in pursuance of those Acts is two years.

THE declaration stated that the defendant was the nominal defendant, for and on behalf of the trustees, carrying into execution the Act of Parliament passed in the reign of his late Majesty King George the third, intitling "An Act for the Maintenance and Improvement of the Harbour of Ramsgate, in the County of Kent, for cleansing, amending, and preserving the Haven and Harbour of Ramsgate, in the County of Kent, and for the better regulation of the same," and the several Acts passed for altering and amending the first-mentioned Act. For that the said trustees seized, took, and carried away, and converted to their own use, and wrongfully and unlawfully, the possession of a good and valuable chattel of the plaintiff, to wit, a mooring chain.

Plea (a)—That the action was commenced and

(a) There was also a plea, replication, and rejoinder which was demurred to; and the question raised by the demurrer was, whether, under the 32 Geo. 3, c. 74, s. 14, and 55 Geo. 3, c. lxxxiv., duty or toll was payable for a cargo of coals on board the plaintiff's vessel, which passed Ramsgate on a voyage from Sunderland to Southampton; notwith-

standing the duty or toll was payable upon a previous decision of the same coasting commission in the same year had been given in support of the plaintiff's plea, referred to Moore v. Shepherd, 2 E. & B. 383, and the press decision on the same point. Whereupon the Court held that the defendant was entitled to the duty or toll, unless the defendant could show that the defendant would consent to be

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things done by the said trustees as such trustees
 uance of, or in relation to, the matters mentioned in
 t of Parliament passed in the 32nd year of the
 f his late Majesty King George the Third, in-
 &c., and the Act of Parliament, passed in the 55th
 the same reign, intituled &c.: that the said things
 ch this action is brought were committed more than
 uths next before the commencement of this suit, and
 ses of action to which this plea is pleaded did not,
 any of them, or any part thereof, accrue within six
 next before the commencement of this suit: that
 e of facts was and is such that this action was com-
 after the period of limitation appointed by the said
 f Parliament, or one of them, had elapsed, and is
 by the said Acts of Parliament, or one of them.
 ication—That this action was brought, and the tres-
 to which the said plea is pleaded were committed,
 e making and passing and coming into operation
 Act of Parliament made and passed in the sixth
 the reign of her Majesty Queen Victoria, being
 act to amend the Law relating to Double Costs,
 of Action, Limitation of Actions, and Pleas of the
 l Issue under certain Acts of Parliament.”
 urreur and joinder therein.

bank for the plaintiff(a).—The 32 Geo. 3, c. 74,
 gives a power of distress on non-payment of rates;
 th by that Act, (sect. 78,) and the 55 Geo. 3, c. lxxxiv.
 ctions against any person for anything done in pur-
 of those Acts “shall be commenced within six ca-
 months next after the act committed, and not after-
 ’ That limitation, however, is abolished by the 5

ecision, they would give
 at in conformity with
 vision of the Court of
 s Bench. *Willes*, for the
 ant, having stated his in-

tention to take the opinion of a
 Court of error, judgment was
 given for the plaintiff, without
 hearing any argument.

(a) See note, *supra*.

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& 6 Vict. c. 97, s. 5 (a), which substitutes a period of years in all cases where the act complained of is under the authority of a public local and personal or a local and personal Act, or other Act of a particular nature. The 32 Geo. 3, c. 74, and 55 Geo. 3, c. 78, are public local and personal Acts. They relate to a particular district and a particular description of persons. Though these Acts contain clauses that they shall be deemed *public Acts*, that renders them *public general Acts*; but only enable them to be given in evidence without proof that they have been examined with the Parliament roll, or printed by the Queen's printer: *Woodward v. Cotton* (b). The 32 Geo. 3, c. lxxxiv. is classed amongst the local and personal Acts; and the 32 Geo. 3, c. 74, which is material, is of the same nature. The Building Act, 3, c. 78, contained some clauses affecting all the subjects, and, nevertheless, it was held to be of a local and personal nature: *Richards v. Easton* (c). This authority was recognised and acted on in *Law v. Law*. However, in *Barnett v. Cox* (e), the Court of

(a) Sect. 5. "And whereas divers Acts commonly called public local and personal, or local and personal Acts, and divers other Acts of a local and personal nature, contain clauses limiting the time within which actions may be brought for anything done in pursuance of the said Acts respectively: And whereas the periods of such limitations vary very much, and it is expedient that there should be one period of limitation only; be it therefore enacted, That, from and after the passing of this Act, the period within which any action may

be brought for anything done in pursuance of any such Act shall be two years, or, in the case of continuing damage, the period shall be one year after such damage shall have ceased; and so much of any clause, or enactment, by which any other time or period of limitation is appointed or shall be, and the same shall be repealed."

(b) 1 C. M. & R. 44.

(c) 15 M. & W. 244.

(d) 1 Exch. 845.

(e) 9 Q. B. 617.

Bench held, that the Metropolitan Police Act, 2 & 3 Vict. c. 47, was not a local and personal Act within the meaning of the 5 & 6 Vict. c. 97. And the Paving and Lighting Act, 3 & 4 Will. 4, c. 90, has been held to be a public Act: *Filkington v. Riley (a)*.

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Willes contra.—The 32 Geo. 3, c. 74, and 55 Geo. 3, c. lxxxiv., are of a different nature from the Acts relating to Ramsgate, viz. the 25 Geo. 3, c. 34; 36 Geo. 3, c. 43; 7 & 8 Geo. 4, c. cvi.; and 1 & 2 Vict. c. lxx. The 32 Geo. 3, c. 74, is in *pari materia* with the 22 Geo. 2, c. 40, which was passed for the public purpose of affording protection to all ships passing through the Downs. That statute recites, that frequent losses of lives and properties happen in the Downs for want of a harbour between the North and South Forelands, and “for carrying, therefore, a work of such *public utility* into execution,” it proceeds to enact several provisions, and, amongst others, it empowers trustees to levy certain duties on all coasting vessels. Those duties are to be published in the London Gazette. The 32 Geo. 3, c. 74, gave the trustees enlarged powers for the purpose of effecting the same public object. It creates no local resources, but makes the toll payable by all vessels passing a particular coast. It has none of the incidents of a local Act; and, even if it did not contain a clause requiring it to be judicially noticed, it would not be necessary to prove it by a copy examined with the roll.

Unthank was not called on to reply.

POLLOCK, C. B.—The question is, whether the 32 Geo. 3, c. 74, and 55 Geo. 3, c. lxxxiv., fall within the provisions of the 5 & 6 Vict. c. 97. I am of opinion that they do. The 55 Geo. 3, c. lxxxiv., is not printed among the public general statutes of the realm; but is classed among the public

(a) 3 Exch. 739.

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local and personal Acts. Prior to the year 1796, and subsequently when the 32 Geo. 3, c. 74 passed, all Acts of Parliament were printed together. Then, is the 32 Geo. 3, c. 74, an Act of a local and personal nature? It seems to me that it is, because it is in *pari materiâ* with the 55 Geo. 3, c. lxxxiv. which the Legislature has placed among the local and personal Acts. In *Barnett v. Cox* (a), a question arose with reference to a statute which was printed among the public general statutes of the realm. This Court had before held that that circumstance was not conclusive, and that it was still open to consideration, whether the provisions of the statute so printed were of a public general or of a local and personal nature. The Court of Queen's Bench seem to have considered, that, as that particular statute was classed among the public general Acts, it was not an Act of a local and personal nature. But whatever conflict there may be between the two decisions, it does not affect this case, for here the latter Act is printed among the local and personal Acts, and the former Act is in *pari materiâ* with it. The defendant is therefore entitled to judgment.

PARKE, B.—I am of the same opinion. The question is one of some nicety. Undoubtedly, the 55 Geo. 3, c. lxxxiv. is classed by the Legislature among the local and personal Acts, and is, therefore, an Act commonly called local and personal. The 32 Geo. 3, c. 74, is in *pari materiâ*, and ought to receive the same interpretation, though I can hardly help thinking that it is of itself an Act of a local and personal nature, for it does not concern all the Queen's subjects, but only a particular class. In deciding this case we need not attempt to reconcile the difference between the judgments in *Barnett v. Cox* and *Richards v. Easto*. In the latter, this Court expressed their opinion as to what

(a) 9 Q. B. 617.

was an Act of a local and personal nature. The Building Act, 14 Geo. 3, c. 78, was classed among the public general Acts; nevertheless, it was impossible not to see that it was an Act of a local and personal nature, because all its provisions, except one or two, related to a particular class and district. The Metropolitan Police Act concerned only persons in the metropolis, just the same as an Act for the regulation of the police in Worcester or Cambridge, or any other place; and I am at a loss to see why a London police Act should be of a different character. If the same question were to be decided, I should not concur in the judgment of the Court of Queen's Bench.

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ALDERSON, B.—I am of the same opinion; and I agree that, if ever the point before the Court of Queen's Bench should come to be decided by us, I should think that this Court was right. How to distinguish between an Act for the regulation of the police in the metropolis and an Act for the regulation of the police in the smallest town in England I cannot see. The question certainly does not depend upon whether one is larger than the other.

Judgment for the plaintiff.

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Nov. 18.

JAYNE v. HUGHES.

By indenture, dated the 27th of Oct., 1827, between the defendant of the one part, and the plaintiff of the other part, after reciting that certain copyhold premises were surrendered to the plaintiff for securing repayment of 300*l.* by him that day lent to the defendant, the plaintiff covenanted, on repayment of that sum and interest on the 27th of April, 1828, to surrender the premises to the defendant; and the defendant covenanted to pay the 300*l.* and interest at the time appointed for payment. There was also a stipulation, that, in default of payment, the plaintiff might take possession of the premises. The deed was, in fact, executed on the

EJECTMENT to recover possession of a copyhold and premises within the manor of Wentala county of Monmouth. The writ was dated the 9th of February, 1854.

At the trial, before *Crompton, J.*, at the last Assizes, it appeared that the defendant Hughes seised in fee of the premises in question, on the 11th of November, 1821, surrendered them in fee to Thomas Morgan, who was admitted. Theophilus Morgan died, his son and heir, Francis Morgan, was admitted the 27th of October, 1827, and he, on the same day, in the direction and consent of Hughes, surrendered the premises in fee to Jayne, the plaintiff, who was admitted by indenture, dated the 27th of October, 1827, between Hughes, the defendant, of the one part, and John Jayne, the plaintiff, of the other part, reciting the surrender of the premises to Francis Morgan to Jayne; also reciting that such surrender was made for the purpose of securing the repayment of 300*l.* to Jayne of the sum of 300*l.* by him that day lent to Hughes with interest; also reciting that Jayne, at the request of Hughes, had consented and agreed to take those presents, for the purpose of shewing the object of the surrender, and that Hughes had consented to the same; also reciting that Jayne, at the request of Hughes, had consented and agreed to take those presents, for the purpose of shewing the object of the surrender, and that Hughes had consented to the same; also reciting that Jayne, at the request of Hughes, had consented and agreed to take those presents, for the purpose of shewing the object of the surrender, and that Hughes had consented to the same. It was witnessed, that, in consideration of the premises, it was thereby declared by and between the parties, &c. (Then followed a covenant by Jayne to pay the 300*l.* and interest on the 27th of April, 1828.)

23rd of August, 1834. No principal, interest, or rent had ever been paid by the defendant. In February, 1854, the plaintiff brought ejectment:—*Held*, that the defendant's acknowledgment, within the 3 & 4 Will. 4, c. 27, s. 14, of the plaintiff's title at the time of the execution of the deed, and consequently his right of entry was not barred.

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to surrender the premises in fee to Hughes).—"And the said P. Hughes doth hereby covenant, promise, and agree with and to the said J. Jayne, his executors, administrators, and assigns, in manner following (that is to say) that he the said P. Hughes, his executors, &c., shall and will well and truly pay or cause to be paid unto the said J. Jayne, his executors, &c., the full and clear sum of 300*l.*, with interest for the same after the rate, at the time, and in the manner in the proviso hereinbefore contained, appointed for payment thereof." There was also a stipulation, that, in case of default in payment of the principal sum or interest, it should be lawful for Jayne, his executors, administrators, or assigns, to enter and take possession of the premises. It was proved, that this indenture was, in fact, executed on the 23rd of August, 1834. No principal, interest, or rent, had ever been paid by the defendant.

It was objected, on the part of the defendant, that the plaintiff's right of entry accrued in 1827; and that, as no interest or rent had been paid, and there was no acknowledgment of title in writing, the right of entry was barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27. It was submitted, on behalf of the plaintiff, that, the deed operated from the time of its execution in 1834, and was, therefore, a sufficient acknowledgment of title within the 14th section of that statute. The learned Judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a verdict for him.

Gray moved, pursuant to the leave reserved (Nov. 3).—The deed in question is not a sufficient acknowledgment of title within the 3 & 4 Will. 4, c. 27; and even assuming it to be so, it is only an acknowledgment that the plaintiff had title at the date of the deed. By the 14th section of that statute it is provided: "That, when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his

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agent in writing, signed by the person in possession or receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same; and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given." To satisfy that enactment, the instrument must contain an express acknowledgment that the person claiming has title. In *Doe d. Curzon v. Edmonds (a)*, a party in possession adversely of land, on being applied to by the party claiming title to pay rent, wrote as follows: "Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have made up my mind to accede to the proposal you

time have passed out of the plaintiff. [*Pollock*, C. B.—There is an admission of title in some one; then why not in the plaintiff? *De non apparentibus et non existentibus eadem est ratio.* *Parke*, B.—Suppose the deed had been without a date.] No doubt, in many cases, a deed operates only from the time of its execution: *Shaw v. Kay* (a); but for the purpose of an acknowledgment of title, it speaks from its date. If it were held, that, for all purposes, deeds only operate from the time of their execution, many titles, good on the face of them, would be in peril for want of a connecting link. As between the parties themselves, the date of a deed is matter of estoppel. Supposing the plaintiff to have surrendered the premises to another person before the execution of the deed, the defendant's covenant would be a valid covenant with the assignee.

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Cur. adv. vult.

POLLOCK, C. B., now said—In the case of *Jayne v. Hughes*, we are of opinion that there ought to be no rule. The question was, whether a mortgage deed was a sufficient acknowledgment of the plaintiff's title within the 3 & 4 Will. 4, c. 27, s. 14. The deed bore date the 27th of October, 1827, but was not in fact executed until the 23rd of August, 1834. No doubt, the effect of the covenant was to admit that at the moment anterior to the execution of the deed the plaintiff had title. If then the deed is to be construed as speaking from the time of its date, the plaintiff's right of entry was barred by the statute; but if, on the other hand, the deed is to be read as speaking from the time of its execution, then there was a sufficient acknowledgment of the plaintiff's title within the meaning of the statute. We are all of opinion that the deed must be taken to speak from the time of its execution. That is the

(a) 1 Exch. 412.

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plain interpretation of what was done by the party is the same as if, on the day of the execution of the a person had heard the defendant use the language contained in it.

Rule refu

Nov. 20.

JOHN ASSOHN and Another v. THE GREAT NORTH
RAILWAY COMPANY.

The Great Northern Railway Company agreed with the plaintiffs to carry for them, at the rate of 170 tons a day, 30,000 tons of coal from a certain colliery to London, and to find waggons at the colliery, and haul them from York to London, the York and Berwick Railway Company undertaking to haul the waggons from the colliery to York; and it was further agreed, that the contract was founded on the basis that there should be no unreasonable detention of the waggons by the York and Berwick Company:—*Held*, that it was a condition precedent to the defendants' obligation the coal, that there should be no unreasonable delay by the York and Berwick C in hauling the waggons.

THE declaration stated, that, on the 23rd of Nov 1853, by an agreement made by and between the plaintiffs and the defendants, the defendants undertook and with the plaintiffs to carry for them, at the rate of 170 tons a day, 30,000 tons of coal from a certain colliery, the Usworth Colliery, to a place called King's Cross, and to find waggons at the said colliery, and haul them filled from York to King's Cross; at 9s. 7d. per ton, including the use of defendants' waggons between York and the colliery and the labour in London of dropping the into barges, such barges to be provided by the plaintiffs and placed by them under the defendants' coal drop the coal dock at King's Cross; the York and Berwick Company undertaking to haul the empty waggons from York to the colliery, and from the colliery to York when filled with coal, at the rate of 3s. per ton; and the plaintiffs with the defendants to pay them the said price of 9s. 7d. per ton. And it was further agreed, that the contract was founded on the basis, that there should be no unreasonable detention of waggons, whether empty or full, between

and the said Usworth Colliery, and that the waggons sent should be loaded daily at the said colliery by the plaintiffs. —Averment: that the plaintiffs were ready and willing to load and fill daily, at the said Usworth Colliery, the waggons which the defendants should have found and sent for the purpose, with the quantities of coals which the defendants were so to carry and find waggons for and haul as aforesaid, and to provide and place barges as aforesaid, whereof the defendants had notice. Breach: that the defendants neglected and refused to carry at the rate agreed on 30,000 tons of coals at 20 hundred weight to the ton, or otherwise, from the said Usworth Colliery to King's Cross, at 9s. 7d. per ton, and they neglected and refused to find waggons at the said colliery for the purpose aforesaid.

Plea: that the alleged neglect and refusal to carry the said coals and find the waggons were caused by the neglect and refusal of the York and Berwick Company to haul the empty waggons from York to the colliery, and from the colliery to York when filled with coals, according to the meaning of the agreement, and by unreasonable detention of waggons empty and full between York and Usworth Colliery, contrary to the intent and meaning of the agreement, and not by the default of the defendants.

Demurrer and joinder therein.

Manisty in support of the demurrer.—The plea affords no answer to the action. Under this agreement, it was the duty of the defendants to take care that the waggons were not detained by the York and Berwick Company. There is an absolute contract by the defendants to *carry*, at a certain specified rate, 30,000 tons of coal from the Usworth Colliery to King's Cross. They only undertake to haul the coal from York to King's Cross, because their line does not extend beyond those limits; but they are to find waggons at the colliery, which are to be hauled by the York and Berwick Company, under a traffic agreement

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between the two companies. The question then is, whether the plaintiffs or the defendants are bound to see that the York and Berwick Company do that which they have contracted with the defendants to do. It is submitted, that it is the duty of the defendants. The basis of the contract is, that the defendants will do that which they have agreed to do, namely, carry from the colliery to London and in furtherance of that object, they undertake that there shall be no unreasonable detention of the waggons between the colliery and York. [*Alderson, B.*—How can it be the basis of the contract, that there shall be no unreasonable detention of the waggons, if such detention may be caused by the defendants themselves? It must mean “provided there is no detention by the York and Berwick Company.”] The matter about the York and Berwick Company was inserted for the purpose of shewing who was to do the hauling between the colliery and York, and at what rate it was to be paid. [*Purke, B.*—If, instead of the word “undertaking,” it had been “on condition,” or “provided” that the York and Berwick Company will haul the empty waggons between the colliery and York, there would have been no question.] Assuming that the defendants contracted on the basis that the York and Berwick Company would do something which they were bound to do under an arrangement between them and the defendants, it is necessarily implied that the defendants would require them to do it.

Bramwell appeared in support of the plea, but was not called upon to argue.

POLLOCK, C. B.—We are all of opinion that the defendants’ construction of the contract is the correct one. It appears to have been made on the basis that there should be no unreasonable detention of the waggons by the York and Berwick Company. Then the defendants, by the

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plea, say that their omission to carry the coal arose from the detention of the waggons by that company. That is, in other words, saying, "we entered into the bargain on condition that a third party would do some act, which he has failed to do, and therefore we are not bound by our contract."

PARKE, B.—I am of the same opinion. The contract is artificially drawn, but I do not entertain the least doubt about its meaning. It is a contract on the part of the defendants to carry, at the rate of 170 tons a day, 30,000 tons of coal from the Unsworth Colliery to London, *provided* the York and Berwick Company, who have undertaken to haul between the colliery and York the waggons to be supplied by the defendants, cause no unreasonable detention of the waggons. Therefore, if the York and Berwick Company perform their undertaking, no doubt the defendants are bound to carry the coal between York and London; but, on the other hand, according to the true interpretation of the contract, it is a condition precedent that there should be no unreasonable delay on the part of the York and Berwick Company in doing that which they have undertaken to do. Then, if it be shewn that the York and Berwick Company have not performed what they undertook to do, there is a complete answer to the action.

ALDERSON, B.—The contract is founded on a condition, which is called the basis of it, namely, that the York and Berwick Company shall fulfil that which they have undertaken to do; but the York and Berwick Company having failed to do so, there is an end of the contract.

PLATT, B.—The contract begins by stating that the defendants agreed to *carry* the coal from the Unsworth Colliery to London; and, if those had been the only words, the defendants would have been bound to carry at all

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events. But the contract goes on to shew in what sense the word "carry" is used. The defendants are to find waggons and *haul*, that is, provide locomotive power between York and London; the York and Berwick Company undertaking to haul between the colliery and York. Then it is declared to be the basis of the contract, that there shall be no unreasonable detention of the waggons by the York and Berwick Company. But that company having failed to perform their duty, the defendants are not liable for their neglect to carry.

Judgment for the defendants.

Nov. 22.

HUTCHINSON v. SYDNEY.

The plaintiff signed and delivered to the defendant the following document:—"In consideration of your having, at my request, agreed to become a director of the Surrey Gas Association, and to be and act as director thereof, I hereby undertake and agree to guarantee, indemnify, and save you harmless from and against all losses, costs, charges, damages, and expenses, which you may bear, incur, sustain, or be put to by reason thereof, or on account of actions as such director; and I do hereby further agree to accept a transfer of twenty-four of your shares in the said association when thereunto requested by you, such transfer to be at my own expense, costs, and charges, and I hereby undertake to pay all calls and instalments for and in respect of such shares." The plaintiff having afterwards sued the defendant for a debt:—*Held*, that the defendant might set off the expenses incurred by him as a director as money paid for the plaintiff's use.

ACTION by drawer against acceptor of a bill of exchange. Plea: set off, for money paid by the defendant for the plaintiff's use.

At the trial, before *Pollock*, C. B., at the London Sittings after last Trinity Term, it appeared that the plaintiff was a promoter of a joint stock company, called "The Surrey Consumers Gas Light and Coke Association;" and that, the plaintiff having applied to the defendant to become a director of the company, he refused to do so, unless the plaintiff would indemnify him against all loss. The plaintiff thereupon signed and delivered to the defendant the following document:—

"17th April, 1849.

"Dear Sir,—In consideration of your having, at my re-

charges, damages, and expenses, which you may bear, incur, sustain, or be put to by reason thereof, or on account of actions as such director; and I do hereby further agree to accept a transfer of twenty-four of your shares in the said association when thereunto requested by you, such transfer to be at my own expense, costs, and charges, and I hereby undertake to pay all calls and instalments for and in respect of such shares." The plaintiff having afterwards sued the defendant for a debt:—*Held*, that the defendant might set off the expenses incurred by him as a director as money paid for the plaintiff's use.

quest, agreed to become a director in the Surrey Consumers Gas Light and Coke Association, and to be and act as director thereof, I hereby undertake and agree to guarantee, indemnify, and save you harmless from and against all losses, costs, charges, damages, and expenses, which you may bear, incur, sustain, or be put to by reason thereof, or on account of actions as such director: and I do hereby further agree to accept a transfer of twenty-four of your shares in the said association, when thereunto requested by you, such transfer to be at my own expense, costs, and charges; and I hereby undertake to pay all calls and instalments for and in respect of such shares.

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The defendant, who resided in Berkshire, acted for some time as a director of the company, and he had spent a sum exceeding the plaintiff's claim in journeys from Berkshire to London, in order to attend the meetings of the directors, and it was now sought to set off the amount as money paid for the plaintiff's use. On the part of the plaintiff, it was submitted, that the costs of these journeys were not the subject of a set-off under the terms of the above document, which was merely a collateral guarantee, and that the defendant's remedy was by a special action for not indemnifying him. The learned Judge was inclined to that opinion, and directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a verdict for him.

Shee, Serjt., having obtained a rule nisi accordingly,

Hawkins (*Atherton* with him) shewed cause.—The expenses incurred by the defendant cannot be set off as money paid to the plaintiff's use. In general, the action for money paid cannot be maintained, unless the one party was liable to pay the money, and the other has been compelled to pay it on his behalf. [*Parke*, B.—*Brittain v. Lloyd* (a) decided,

(a) 14 M. & W. 762.

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that the action is maintainable in every case in which plaintiff has paid money to a third party, at the request express or implied, of the defendant, with an undertaking express or implied, to repay it; and it is not necessary that the defendant should have been relieved from a liability for the payment.] These were not expenses incurred by the plaintiff, and his obligation in respect of them depended entirely on the agreement in question; and that is a contract to indemnify. Until an account has been taken between the parties, it cannot be ascertained whether the defendant has sustained any loss. The plaintiff held the shares as a trustee for the defendant, and if the shares had been sold at a profit, so as to cover the expenses incurred by the defendant, could it be contended that he would nevertheless be entitled to set them off? This is not an absolute undertaking to pay the defendant's expenses, but only to pay the amount which may be found due after a balance struck. [*Parke, B.*—That construction would import into the agreement this further stipulation, that, provided the shares were profitable, the plaintiff should pay nothing. The true meaning of the agreement is, that the defendant shall not be a loser upon the whole transaction. [*Alcock, B.*—Suppose the defendant kept the shares but ceased to act as a director, is he not to be paid the expenses incurred whilst he was a director?—He also referred to *Levy v. Samuel* (a).

Shee, Serjt., and *H. Bullar* appeared in support of the rule, but were not called upon to argue.

POLLOCK, C. B.—We are all of opinion that the rule ought to be absolute. The undertaking of the plaintiff to indemnify the defendant against all expenses which he might incur by reason of his acting as director. Then, having been compelled to make certain payments in consequence of his so acting, the plaintiff is bound to repay.

(a) 8 Q. B. 685.

and there is a debt for which money paid would lie. At the trial, I doubted whether this agreement was not a mere undertaking to indemnify, upon which the defendant ought to bring a special action for the breach of that contract; but I am now satisfied, that, under the terms of it, the defendant might maintain an action for money paid, and is therefore entitled to set off his claim.

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ALDERSON, B., and PLATT, B., concurred (a).

Rule absolute.

(a) *Parke, B.*, had left the Court.

CORNES v. TAYLOR.

Nov. 6.

THIS was an action by indorsee against acceptor of a bill of exchange. At the same time that the plaintiff issued the writ, he proceeded by summons in the Court of Bankruptcy, under the 12 & 13 Vict. c. 106, s. 78. Before, however, that summons was returnable, the defendant took out a summons before a Judge at Chambers, to stay proceedings in the action, on payment of debt and costs, and an order was thereupon made by consent. The proceedings in bankruptcy were consequently abandoned, but the plaintiff refused to deliver up the bill of exchange to the defendant unless he also paid the costs of those proceedings. *Crowder, J.*, at Chambers, having made an order that the bill of exchange be given up to the defendant,

The plaintiff sued the defendant on a bill of exchange, and at the same time proceeded by summons in bankruptcy, under the 12 & 13 Vict. c. 106, s. 78. The action having been stayed on payment of debt and costs:—*Held*, that the plaintiff had no right to keep the bill until the costs in bankruptcy were paid.

Spinks now moved to set aside that order.—The 85th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, enacts "That, where any such trader against whom an affidavit of debt is filed by any creditor as aforesaid shall be summoned to appear before the Court in

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which such affidavit shall be filed, every such trader shall have such costs as the Court in its discretion shall think fit; or the Court may direct the costs to be paid by the party of, incident to, or attendant upon such affidavit or summons to abide the event of any action which may be brought or shall thereafter be brought for the recovery of such demand or any part thereof; and in any case such costs shall be costs in the cause, and shall be paid under the judgment and execution in such action. In *Covington v. Hogarth* (a), it was held, that proceedings against a trader under the 5 & 6 Vict. c. 122, s. 1, may be taken simultaneously with an action at law for the recovery of the same debt; and though the debtor may have a demand under pressure of the former proceedings, the Court will not stay the action without payment. Moreover, it is necessary that the plaintiff should deliver up the bill, in order to support an application to the Court of Bankruptcy for costs. [*Parke*, F. purpose would be answered by an affidavit that the bill had been delivered up under a Judge's order.]

POLLOCK, C. B.—There ought to be no rule against a trader to a bill of exchange, who has paid it, has a right to have the bill given up to him, in order to guard against its being again put in circulation. The plaintiff must deliver up the bill, on the defendant's giving him a bill containing the terms of it.

PARKE, B., and ALDERSON, B., concurred.

Rule r

(a) 7 M. & Gr. 1013.

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ALLEN v. PREECE

Nov. 4.

THIS was an action for an assault upon, and for the false imprisonment of, the plaintiff. Plea, not guilty "by statute," and issue thereon. The following statutes were set out in the margin of the plea:—7 Jac. 1, c. 5; 21 Jac. 1, c. 12; 10 Geo. 4, c. 44; 2 & 3 Vict. c. 47.

At the trial, before *Alderson*, B., at the Middlesex Sittings in last Easter Term, it appeared that the plaintiff resided in Islington, and being in arrear with his parish taxes, was summoned to pay them under the Islington local Act, 5 Geo. 4, c. cxxv., and, having failed to do so, the defendant, as a licensed appraiser and constable, on the 2nd of March, 1854, levied on the plaintiff's goods, under a warrant granted for that purpose. Prior to this, namely in June, 1853, one of the churchwardens of the parish of Islington, acting under the local Act above mentioned, sent the following written application to the Commissioners of Police:—

"To the Commissioners of the Metropolitan Police.

"Gentlemen,—I beg to recommend Thomas Preece, of &c., in the parish of Islington, as a fit and proper person to assist the collectors in the service of summonses and distraining for rates, and respectfully ask that you will permit him to be sworn in as a constable for that purpose. I am, &c.

"June 8, 1853.

J. S."

In pursuance of this application, the defendant was appointed under the following instrument, and he was duly sworn to act as a constable.

application to the commissioners mentions a particular purpose only, as, for instance, the necessity for an additional constable to execute distress warrants, to recover the amount due for parish rates. The necessity for such appointment is entirely a matter upon which the commissioners are to exercise their own judgment.

Under the 8th section of the Metropolitan Police Act, 2 & 3 Vict. c. 47, which enacts, "that it shall be lawful for the commissioners of police, if they shall think fit, on the application of any person or persons shewing the necessity thereof, to appoint and swear any additional number of constables to keep the peace at any place within the metropolitan police district, at the charge of the person or persons by whom the application shall be made, but subject to the orders of the said commissioner, and for such time as they shall think fit:" the appointment of a constable is an appointment of the person to act as a constable for all purposes, although the

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"Metropolitan } This is to certify that the Commission
 PoliceDistrict. } of Police of the Metropolis have appointed
 and sworn in Thomas Preece as a constable, to keep
 peace in the parish of St. Mary, Islington, in the county
 Middlesex, at the charge of the guardians of the poor of
 said parish, but subject to the orders of the said commissioners until this appointment be by them cancelled.

"W. HAY,

"Commissioner of Police of the Metropolis
 "Whitehall-place, June 14, 1853."

Shortly after the distress had been levied, the plain went to the defendant's house, to obtain, as he alleged receipt for the amount of the levy; an angry discussion took place on the occasion between the plaintiff and defendant, and the plaintiff used some strong language towards the defendant's wife, the result of which was, that defendant, on the application of his wife, arrested the plaintiff and took him to a police station and preferred a charge against him, which, however, the officer on duty refused to take.

Under these circumstances, it was contended, on the part of the defendant, that he was a constable duly appointed under the local Act, 5 Geo. 4, c. cxxv., and the Metropolitan Police Act, 2 & 3 Vict. c. 47, s. 8, and as such, that he was entitled to notice of action, which had not been given him and that he was entitled to have the verdict entered against him. The 8th section of the 2 & 3 Vict. c. 47, enacts, that "it shall be lawful for the said commissioners of police if they shall think fit, on the application of any person or persons shewing the necessity thereof, to appoint and swear an additional number of constables to keep the peace at any place within the metropolitan police district, at the charge of the person or persons by whom the application shall be made, but subject to the orders of the said commissioners and for such time as they shall think fit &c." The 79th section

of the Islington local Act, 5 Geo. 4, c. cxxv. incorporates the general Act. The 46th section of the local Act, in case of default in payment of the rates, empowers and directs a justice of the peace for the county to summon the defaulter to appear and shew cause why he shall not pay the same; and in case of his not shewing good cause, and of refusing to pay the amount due, the justice is directed to grant a warrant authorising the person duly appointed to collect the rate to levy the same by distress upon the defaulter's goods, &c. The 47th section gives the form of the warrant. The 48th section enacts "that in all cases where a distress is authorised to be made by this Act, if any constable, headborough, beadle, or peace officer of the parish or place where the same is to be made, upon being called upon by any trustee, collector or collectors, under this Act, or any other person (who shall have obtained such warrant of distress), shall refuse or neglect to aid and assist in making such distress and sale, such constable or headborough, beadle or peace officer, shall for every such offence forfeit and pay any sum not exceeding the sum of 40s." On the part of the plaintiff, it was contended that the appointment of the defendant was only for the special purpose of collecting the rates, and not for the general purposes of a peace officer. The learned Judge inclined to the latter opinion, and left the question to the jury, whether the defendant, at the time he arrested the plaintiff, did so under the bonâ fide belief that he had authority to act as a constable; a verdict was found for the plaintiff, with 10*l.* damages; leave being reserved to the defendant to move to set that verdict aside, and to enter a verdict for him if the Court should be of opinion that he was duly appointed to act as a constable for general purposes.

In last Easter Term, *Atherton* obtained a rule nisi in pursuance of the leave reserved.

Prentice shewed cause.—The defendant was not duly ap-

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pointed to act as a constable for general purposes. application by the churchwardens to the commissioner of police is for the limited purpose of serving summonses executing warrants of distress; and further, there is no evidence of the necessity for an additional constable. The applicants were bound to shew the existence of a necessity to establish the validity of the plaintiff's argument.—He was then stopped by the Court.

Atherton in support of the rule.—The defendant was duly appointed a constable of the peace for general purposes. The appointment precisely follows the 8th section of the 3 Vict. c. 47. The powers given to the commissioner of police in making such an appointment are very extensive. The 46th, 47th, and 48th sections of the local Act mentioned are referred to for the purpose of shewing the proceedings to be adopted in levying rates, and the duties of the officer who is entrusted with the execution of the warrant. But the 8th section of the public Act (which is incorporated with the local Act by the 79th section), does not authorize the commissioners of police to appoint the officer for the purpose of levying rates or of performing any particular duties. The party in respect of whom the application is made, is to be sworn "to keep the peace," and the commissioners, "if they shall think fit," are to appoint him. It is, therefore, the proper judges of the necessity of an additional constable.—The Court then called upon

Prentice.—The 8th section requires, as a condition precedent to the making of the appointment, that it shall be made on the application of a person *shewing the necessity* therefor. There was no evidence whatever that any such necessity existed in this case. [*Pollock*, C. B.—Surely the commissioners are the proper persons to decide whether the necessity exists. That is a matter which neither the Court nor a jury could fitly determine.] If the churchwardens shewn in their application that an additional constable

requisite, the appointment would, perhaps, have been good. This application, however, merely amounts to a respectful request that the appointment may be made; and if this were to be deemed sufficient, the commissioners would be empowered to appoint any person they might think fit, without any necessity for it whatever.

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POLLOCK, C. B.—I am of opinion that the rule must be absolute to enter a verdict for the defendant. I certainly thought, at one time, from an imperfect acquaintance with the precise language of the section of the general Act under which the appointment was made, that, inasmuch as the application for the appointment of the defendant as a constable, was for a limited purpose only, and his appointment was for general purposes, the appointment was bad. It was so contended, that, as no necessity was shewn for the appointment, it was bad for that reason, inasmuch as the commissioners in such case had no authority to make it. But now our attention has been directed to the language of the 14th section of the general Act, the matter is clear. In the course of the argument, I asked the learned counsel for the plaintiff—who was the proper party to judge of the necessity for the appointment? It certainly would be very inconvenient, that either the Court or a jury should be called upon to decide that matter. Now, the true meaning of the 14th section is, that the commissioners shall make the appointment, *if they shall think fit*, on the application of the person shewing the necessity for the appointment, that is to say, provided the commissioners themselves are satisfied on the point. I think, in the present case, that we may infer the existence of such necessity, as there is nothing to contradict it. The application was for the appointment of the defendant as a constable, to enable him to perform some of the special duties which a constable is bound to perform; and though quoad hoc the application was not for the appointment of a constable with general powers, still under

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this section of the Act, the commissioners having had application made to them for the appointment of a constable for these special duties, upon the appointment being made, the person appointed has general powers; and it may be taken that the commissioners, having thought fit to make the appointment, were satisfied of the necessity for it.

PARKE, B.—I am of the same opinion. The point served was, whether the defendant was duly appointed constable for the district in question. At first, I thought that the object of this statute was to empower the commissioners of police to make the appointment for a limited purpose only; but, I am now clearly of opinion, that, according to the terms of the section, where the appointment is made it is so for general purposes, although the application upon which it is made mentions limited purposes only; and, therefore, if the application be founded upon the necessity for an additional officer to levy the rates, or for such other purpose, still the power given to the commissioners is to make the appointment for all purposes. But then, Mr. *Prentiss* says, that, in order to authorise the making of the appointment, the application must shew on the face of it “the necessity thereof.” Now, the Act of Parliament does not require the application to be in writing. It may therefore be made verbally, and when so made, the parties may represent the necessity for it, and the commissioners are to judge of that, in exercising the power given to them by the Act. Here the parish officers represent to the commissioners that an additional officer is necessary, and the officer’s expenses are to be paid by the persons making the application. I think that, in substance, this is an application by the parish officers, shewing that an additional constable is necessary.

ALDERSON, B.—I am of the same opinion. I think that the application casts the duty upon the commissioners to make inquiry as to the necessity of the appointment, and

that the limited purposes mentioned in support of the application are a means of shewing what the necessity is; but such terms do not limit the appointment; and when the person is appointed to act as a constable he is appointed for all purposes. The commissioners are themselves to judge whether the person submitted to them is a proper person. I may add that I should not have reserved any such point if my attention had been more fully directed to the particular clause of this statute, but I should have nonsuited the plaintiff.

Rule absolute.

ORGAN v. BRODIE.

Nov. 7.

THE declaration was for board, lodging, attendance, and necessities, supplied to divers persons by the plaintiff for the defendant at his request, and for money paid and money due on an account stated.—Plea, never indebted; and issue thereon.

At the trial, before *Pollock*, C. B., at the London Sittings after last Term, it appeared that the action was brought for the recovery of the price of food, lodging, and medicine, which had been supplied by the plaintiff under the following circumstances. The defendant was the owner of a collier, and whilst the vessel's anchor was being weighed, some of the tackle gave way, and several of the sailors on board were seriously injured. The captain had the men conveyed on shore at Sheerness, the nearest landing-place, and he took them to the nearest public-house, which happened to

Several sailors on board a merchant vessel, having met with a serious accident in weighing the vessel's anchor, were taken on shore by the captain to the plaintiff's, a public-house, the captain telling the plaintiff that the owner of the vessel would pay for what the sailors had. The captain immediately afterwards hired

some fresh hands, and proceeded on the voyage. At the time the sailors were entrusted to the care of the plaintiff, there was no probability that they would be able to resume their duties for that voyage, and they remained at his house for several weeks.

In an action against the owner of the vessel for food and medicine supplied to the sailors, —*Held*, that, as the matters supplied were not necessary for the due prosecution of the voyage, the captain had no authority to pledge the owner's credit, and consequently the latter was not liable.

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be the plaintiff's. The captain told the plaintiff that owner of the ship would pay for the men. The ship, the remainder of the crew, and with some fresh hands whose assistance had been obtained by the captain, proceeded on the voyage. The injured sailors remained at plaintiff's house for a considerable time, and there was prospect at the time when they were taken there that they would be able to continue the voyage.

Under these circumstances, the Lord Chief Baron was of opinion that the defendant was not liable, inasmuch as the captain had no authority to pledge the owner's credit. He therefore nonsuited the plaintiff, reserving leave to him to move to set aside the nonsuit, and enter a verdict for the amount claimed.

Bramwell now moved accordingly.—It is admitted that the owner of a vessel is liable only for matters furnished which are necessary for the due prosecution of the voyage. At the time these sailors were entrusted to the care of the plaintiff, for anything the plaintiff knew, they would rest on the voyage. [*Pollock*, C. B.—There was no probability at the time the sailors were landed that they would be in a condition to return to the ship within a reasonable time; for, in fact, they stayed at the plaintiff's house for several weeks, and the captain immediately hired fresh hands and proceeded on the voyage.]

PARKE, B.—There is no pretence for saying that this case falls within that general authority which the master of a vessel has of pledging the credit of the owner for such matters as are necessary for the due prosecution of the voyage; for the facts shew that it was not necessary that the seamen should be cured, in order that the vessel might proceed on her voyage. If that had appeared to be the case, the owner would have been responsible for all necessary supplies of medicine ordered by the captain, and for

haps even for provisions. But as there is no ground for saying that these matters were necessities in that sense, the captain had no authority to pledge the owner's credit. The action, therefore, will not lie.

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POLLOCK, C. B., and ALDERSON, B., concurred.

Rule refused (a).

(a) *Martin*, B., had left the Court.

THE NORTH WESTERN RAILWAY COMPANY *v.* SHARP.

Nov. 7.

THE first count of the declaration stated, that, in consideration that the plaintiffs would retain and employ the defendant as their attorney and solicitor, for reward, the defendant promised the plaintiffs that he would use proper care and diligence in the keeping and preservation of any papers of the plaintiffs that might be in and come to his hands as such attorney and solicitor as aforesaid, and would keep them in a reasonable manner, and on the request of the plaintiffs, and upon having his lien, if any, upon the said papers satisfied by the plaintiffs, would deliver up the said papers to the plaintiffs in a reasonable manner. The declaration then alleged, that the plaintiffs, relying on the defendant's promise, retained, and employed him as their attorney and solicitor in manner aforesaid; and that, although many papers were in the defendant's hands as such attorney, &c., yet the defendant disregarded his promise in this, that he did not use proper care and diligence in the keeping and preservation of the said papers, and did not keep the same in a reasonable manner; by reason whereof the said papers belonging to various matters became mixed up one with another, and in great disorder and

It is the duty of an attorney or solicitor, when duly called upon by his client to deliver to him the papers of which he has the charge, to deliver them in a reasonable condition. The question, whether the condition in which they are delivered is reasonable, is for the jury.

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confusion ; and further, that the defendant, when ed to deliver up the said papers, his lien thereon been previously satisfied, did not deliver up the said to the plaintiffs in a reasonable manner, but in a great disorder and confusion, &c.—Pleas: first, non sit ; and, secondly, that the defendant did not break mise as alleged.—Issues thereon.

At the trial, before *Crowder, J.*, at the last I Assizes, it appeared that the defendant had acted as solicitor to the company for several years ; but that, so before this action was brought, the company had another person in the defendant's place to transact business for them, and had required the defendant to deliver up the papers and documents relating to the affairs of the company, which he had in his possession. The defendant had delivered the papers to the company in a state they considered a disordered state, and they had incurred some expense in having them arranged and put into order and state.

On the part of the defendant, it was contended that there was no such obligation on the defendant as was claimed by the plaintiffs. The learned Judge referred the case to the jury, who found a verdict for the plaintiffs for one shilling, leave being reserved to the defendant to move to set the verdict aside, and to enter a verdict in his favor.

Watson now moved accordingly.—Although the authority to be found in the books upon the subject is submitted, that the law casts no obligation on a solicitor or attorney to deliver up the papers of his client in any particular order or condition. [*Parke, B.*—entirely a question for the jury.] If a solicitor *wilfully* delivers the papers in a state of confusion, he is liable ; but if he is only bound to keep them in such a state as may be found convenient.

POLLOCK, C. B.—There can be no doubt that it is the duty of a solicitor to deliver up his client's papers in a reasonable state of order. He has no right to mix them all together, and then deliver them so mixed up to his client. The question, whether the defendant in this case did deliver the papers, when required, in a reasonable state and condition was for the jury. That question was left to them, and they found that he did not; but, at the same time, they appear to have thought that no damages had been sustained, or that the objection to the mode in which the papers were delivered was a captious one, by finding a verdict for the plaintiffs with nominal damages only.

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PARKE, B.—The learned Judge's view was correct. If the person to whom papers are entrusted is not bound to keep them in such order as is convenient for reference, at all events he is bound to deliver them up in a reasonable and fit condition for use, when called upon to do so by competent authority. That is the obligation alleged in the declaration, and it is an obligation cast upon the defendant by law. Whether the defendant violated that obligation is a question for the jury, and they have found that he has; but they awarded nominal damages only, on the ground, as it would seem, that there had been great delay in bringing this action.

MARTIN, B.—I think that the law imposes the duty upon an attorney, as it does upon every person who has the custody of another person's property, to deliver it up in a reasonable state. The steward of a manor, for instance, is bound, when called upon, to deliver up the papers of which he has the charge in a proper condition.

Rule refused (a).

(a) *Alderson, B.*, had left the Court.

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CHARLOTTE KILDERBEE and Another v. AMBROSE, Clerk

In 1798, Dr. K., the ecclesiastical incumbent of a living, redeemed the land-tax charged on his rectory out of his own estate, under the 38 Geo. 3, c. 60, and did not, in his contract with the Commissioners for the Reduction of the National Debt, declare his option to be considered a purchaser of the land-tax (whereby, according to the provisions of the 37th section of that statute, the lands became exonerated from the land-tax, and chargeable, for the benefit of the incumbent, his executors, administrators, and assigns, with the amount of the 3*l.* per cent. Consols transferred, and with the payment of a yearly sum, by way of interest, equal to the amount of the land-tax redeemed):—*Held*, first, that Dr. K., as an ecclesiastical incumbent, had such an estate as is contemplated by the 37th section of the 38 Geo. 3, c. 60, taken in connection with the 39 Geo. 3, c. 6, s. 5; and that he was entitled to create the charge on the living; and, secondly, that his personal representatives were entitled to maintain an action against the succeeding incumbent for the recovery of the interest accrued due on the amount of the 3*l.* per cent. Consols so transferred, from the time when the latter succeeded to the rectory.

THE declaration stated, that, after the passing of the 34 Geo. 3, c. 60, and the 39 Geo. 3, c. 6, one Samuel Kilderbee was rector of Trimley St. Martin Athelstone and Stratton, annexed, in the county of Suffolk, and as such rector was seised in his demesne as of freehold, in right of his said rectory, of and in certain messuages, lands, tenements, &c. in the hundred of Colnies, in the said county, to wit, the rectories of Trimley St. Martin Athelstone and Stratton, annexed, barn, glebe lands, tithes, and hereditaments thereto belonging; and the said messuages, lands, &c. were then, and until the redemption thereof thereafter mentioned, charged with land tax, to wit, to the amount of 4*l.* by the year, from the 25th of March, 1798, and were then, to wit, on the 8th of December in that year, duly certified under the hands of W. Layton and W. Bolton, two of the commissioners of land tax for the said hundred, to be charged. And thereupon afterwards, and before the 25th of March, 1799, to wit, on the 16th of March, in the said year, the said S. Kilderbee, having then such benefit of preference as by the first-mentioned Act of Parliament is required, duly contracted with M. Edgar, and T. Kerridge, two of the commissioners duly appointed for the purposes under the Acts, for the redemption of the said 6*l.* land tax, and by the said contract the consideration for such redemption was declared to be 220*l.* capital stock in the Reduced 3 per cent. Bank Annuities, to be transferred to the commissioners for the reduction of the national debt, at the time and the manner thereafter mentioned; and that the said com-

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tract was then duly certified by the said M. Edgar and T. Kerridge, according to and in pursuance of the said first-mentioned Act; and the said sum of 220*l.* was duly, and out of the proper monies and estate of the said S. Kilderbee, transferred to the said commissioners, and the said contract of redemption was duly registered; whereby, and by reason of the premises and the said Acts, the said land tax of 6*l.* became and was redeemed by the said S. Kilderbee, and the said messuages, lands, &c. (he the said S. Kilderbee having expressed no option of being deemed a purchaser), were wholly freed and exonerated from the said land tax, and chargeable for the benefit of the said S. Kilderbee, his executors, administrators, and assigns, with the amount of the said money so transferred as aforesaid as the consideration for the redemption of the said land tax, to wit, the sum of 220*l.*, and with the payment of a certain yearly sum by way of interest thereon equal in amount to the land tax so redeemed, to wit, of the sum of 6*l.*; and that afterwards, on the 4th of September, 1847, the said S. Kilderbee died intestate; and thereupon administration of his goods, &c. were granted to Spenser Horsey de Horsey, the son and heir of the said S. Kilderbee, who then became and was possessed of and entitled to (as such administrator) the said sum of 220*l.* so transferred as aforesaid, and the said yearly sum of 6*l.* in lieu of redeemed land tax charged upon the said messuages, lands, &c.; and that afterwards, on the 17th of March, 1851, the said S. H. de Horsey, as administrator as aforesaid, by deed and for the considerations therein mentioned, assigned, granted, and transferred to the plaintiffs, their executors, administrators, and assigns the said sum of 220*l.* Reduced 3*l.* per cent. Bank Annuities, and the said yearly sum of 6*l.* being by way of interest thereon, and equal in amount to the said land tax so redeemed, to hold the same to the plaintiffs, their executors, administrators, and assigns, with the same benefits and advantages, and subject to the same right and power of redemption, restric-

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tion, and conditions as the same were held by the said S. H. de Horsey; and that, after the death of the said S. Kilderbee in the month of November, 1847, the defendant was in due form of law presented to the said rectory of Trimley St. Martin Athelstone and Stratton annexed, and lawfully instituted and inducted into the same, &c., and became rector thereof, and as such became beneficially entitled to the said messuages, lands, &c., upon which the said sum of 220*l.*, and the yearly sum of 6*l.* by way of interest, equal to the land tax so redeemed, were charged; and that afterwards, on the 29th of September, 1853, the sum of 18*l.*, being the yearly sum chargeable and payable as aforesaid out of the said messuage, lands, &c. for the space of three years then last elapsed, became and was due and in arrear from the defendant to the plaintiffs, (the defendant never having paid or offered to pay the said sum of 220*l.* to the plaintiffs, or required an assignment of the said yearly sum in lieu of land tax), and still is in arrear, contrary to the said statutes.

Demurrer and joinder.

The demurrer was argued in the present Term (Nov. 9)

Willes (*Finlason* with him) in support of the demurrer. —The question turns on the 38 Geo. 3, c. 60, and the 39 Geo. 3, c. 6, and mainly upon the 37th section of the former Act. The 37th section of the 38 Geo. 3, c. 60 (a), enacts

(a) The following sections of the 38 Geo. 3, c. 60, are those to which reference was made on the argument.—

Sect. 8 enacts, "That it shall be lawful for the commissioners specially to be appointed for the purpose of this Act, or so many of them as shall be present at any meeting or meetings to be holden in any county, riding, stewartry, city, borough, cinque

port, town, or place, or any two or more of them, to contract or agree with all and every person or persons, bodies politic and corporate, guilds, mysteries, fraternities and brotherhoods, whether corporate or not corporate, having or holding any manors, messuages, lands, tenements, or hereditaments described in the said Act of the present session of Parliament, for the redemption

where any person or persons having such benefit of
 xce as hereinbefore mentioned, and who shall not be

land tax charged upon
 spective manors, mes-
 ands, tenements, or he-
 nts aforesaid, according
 assessment and rate made
 made in pursuance of
 Act, upon the terms and
 is, and in manner here-
 escribed and mentioned.

12. "That it shall be
 r all such bodies politic
 porate, and companies,
 sons before described,
 ther persons having any
 r interest in, or being
 te heirs of entail enti-
 heir order to succeed to
 nors, messuages, lands,
 ts, or hereditaments,
 any land tax hereby
 leable shall be charged,
 tenants at rack rent for
 a of years, or from year
 or at will, and except
 holding under the crown
 ds or tenements within
 rey and receipt of the
 er or the Duchy of
 r or, under the Duke of
 l any lands or tenements
 g to and parcel of the
 f Cornwall, for years, or
 ur to year, or at will), to
 and agree with the said
 ioners specially to be
 d for the purposes of
 t, in the county, riding,
 y, city, borough, cinque
 wn, or place, where such
 messuages, lands, tene-
 r hereditaments are situ-
 the redemption of the said
 t charged thereon, or any

part thereof, upon the terms and
 conditions, and subject to the re-
 gulations hereinafter mentioned,
 and that such bodies politic and
 corporate, companies, and per-
 sons having such estate or in-
 terest as aforesaid, shall be en-
 titled so to contract, in preference
 to all other bodies politic and
 corporate, and persons whatso-
 ever, provided they shall con-
 tract on or before the 25th day
 of March, which will be in the
 year 1799.

Sect. 13. "That all such bodies
 politic and corporate, and com-
 panies, and all persons who shall
 be in the actual possession of or
 immediately entitled to the rents
 and profits of any such manors,
 messuages, lands, tenements, or
 hereditaments as aforesaid,
 whereon any land tax hereby
 made saleable shall be charged,
 (other than and except tenants
 at rack rent for any terms of
 years, or from year to year, or
 at will, and except tenants hold-
 ing, under the Crown any lands
 or tenements within the survey
 and receipt of the Exchequer or
 the Duchy of Lancaster, or under
 the Duke of Cornwall any lands
 or tenements belonging to and
 parcel of the Duchy of Cornwall,
 for any term of years, or from year
 to year, or at will), and such com-
 mittees, curators, tutors, guar-
 dians, or trustees as aforesaid, on
 the behalf of the persons to whom
 they are such committees, cura-
 tors, tutors, guardians, or trus-
 tees, shall be preferred in the

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seised of or entitled to any estate of inheritance
 manors, messuages, lands, tenements, and heredita

purchase of such land tax, or any part thereof, to any bodies, corporations, or companies, or persons having any estate or interest in remainder, reversion, or expectancy, or being substitute heirs of entail, in the same manors, messuages, lands, tenements, or hereditaments; provided such bodies corporate, or companies, and persons so to be preferred, shall offer to contract for the redemption of such land tax on or before the 25th day of December, 1798; and in case no contract shall be entered into, by or in the behalf of the bodies, corporations, or companies, or persons so in possession, or immediately entitled as aforesaid, for the redemption of the said land tax, on or before the said 25th day of December, 1798, then the bodies, corporations, or companies, or the person or persons having such estates and interests in remainder, reversion, or expectancy, or the substitute heirs of entail called to succeed in the said manors, messuages, lands, tenements, or hereditaments, or their respective committees, curators, tutors, guardians, or trustees, on their behalf, shall be entitled to redeem such land tax, or any part thereof, in preference to any other person or persons having no estate or interest therein, and not being called to succeed therein as substitute heirs of entail, according to the priority of such respective estates or interests, such priority to be set-

tled by the said commission in case the parties shall be about the same; Provided, that no such bodies corporate, or companies, or persons in remainder, reversion, or expectancy, or substitute heirs of entail as aforesaid, shall be entitled to such benefit of preference as last mentioned, unless a contract for the redemption of such land tax shall be entered into by or on the behalf of him, her, or them, on or before the said 25th day of December, 1799.

Sect. 14. "That where such manors, messuages, tenements, or hereditaments aforesaid shall be leased or let at a rack rent for any term or number of years, will, the person or persons, bodies, corporations, or companies, beneficially entitled to the same, reserved or made payable by such lease, or demise shall, notwithstanding any covenant or agreement for the payment of the land tax charged on such manors, messuages, lands, tenements, or hereditaments, tenant or lessee thereof, be considered as being in the possession of such manors, messuages, lands, tenements, or hereditaments for the purpose of claiming and being entitled to such benefit of preference as aforesaid; and where a tenant or lessee shall be bound by agreement to pay such land tax during the continu-

any land tax shall be charged, shall redeem such by and out of his, her, or their own estate, and shall,

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mise, and the contract and tax shall be enjoyed by or on the behalf of any person, body, or company so entitled, the amount of land tax so purchased by the continuance of the lease or demise, be consistent reserved or made such lease or demise, the powers shall be enjoyed for the redemption, as for the redemption when in arrear.

"That when any land shall have been conveyed under any such lease or demise as aforesaid, in behalf of any person, body, or company aforesaid, the absolute estate in fee simple therein, in every such case the person, body, or company, having or being entitled to any interest in succession, reversion, or expecting substitute heirs entitled to succeed in the manors, messuages, tenements, or hereditaments, or hereof the land tax whereof he has been so contracted at any time or times the estate or interest shall devolve, by reason of the determination of the preceding estate, or of the interest, or by the death of the heir of entail, upon the substitute heir of entail, be entitled, and he, she, and they is and are

hereby authorised and empowered to demand from the original contractors for such land tax, their executors, administrators, or assigns, an assignment of his, her, or their interest in such contract, or such part thereof as shall then be in force, to them, their executors, administrators, or assigns, upon transferring to such original contractors, their executors, administrators, or assigns the like amount of 34. per centum Bank Annuities in the same stocks respectively as was transferred by such original contractors, as the consideration for the redemption of such land tax, or such part thereof as shall then be remaining in the names of the commissioners for the reduction of the national debt in pursuance of this Act, which assignment such original contractors, their executors, administrators, or assigns, are hereby required to execute accordingly, and so from time to time every other person, body, corporation, or company, beneficially entitled in remainder, reversion, or expectancy, and every substitute heir of entail called to succeed to the said manors, messuages, lands, tenements, or hereditaments, shall at any time or times after their respective estates and interests shall vest in possession by reason of the determination of the preceding estate, or of the estate devolving upon the substitute heir of entail, in like manner be entitled, and he, she, and they is and are hereby au-

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at the time of entering into the contract for the redemption thereof, have declared his, her, or their option to

authorised and empowered to demand an assignment from the person or persons, bodies, corporations, or companies, who shall then be the proprietor or proprietors of such land tax, of his, her, or their interest therein, upon transferring to him, her, or them the like amount of 3*l*. per centum Bank Annuities as aforesaid, which assignment such proprietor or proprietors is or are hereby required to make and execute accordingly; and in case any proprietor or proprietors hereby required to make any such assignment as aforesaid, (being of full age, and competent to make the same) shall refuse so to do, then and in every such case the proprietor or proprietors so refusing shall and may be compelled, by an order of the High Court of Chancery in England, or Court of Session in Scotland, or the Court of Exchequer in England or Scotland respectively, (to be made upon hearing all parties, concerned on the petition of the party hereby authorised to demand the same), to make such assignment as aforesaid, and such Court shall have power to award costs to either party, if, upon the circumstances, it shall think fit so to do; and it shall be lawful for any such proprietor or proprietors hereby required to make any such assignment as aforesaid, who at the time the same shall be demanded shall be under the age of 21 years, or be under any other legal disability or incapacity, by

the direction of the Court of Chancery, Session, or Exchequer respectively, to sign an order to be obtained from the Court aforesaid, to make such assignment, which shall be as effectual in law, to all intents and purposes whatsoever, as if she, or they were of the age of 21 years, and free from any legal disability or incapacity by any law, custom, or usage contrary thereto in any way withstanding; Provide that, upon every such assignment, the manors, lands, tenements, and premises, whereon the land tax assigned shall have been charged shall from thenceforth and exonerated from the land tax, unless the assignee or assignees thereof shall exercise like option to be inserted in the assignment, which is before directed to be inserted in the original contract, where such option shall have been declared by the contractor.

Sect. 19. "That, for the purpose of redeeming the land tax charged on any manors, lands, tenements, or premises, it shall be lawful for all bodies, politic or corporate and companies aforesaid trustees for charitable or public purposes, being in actual possession, or entitled beneficially to the rents and profits of such manors, lands, tenements, or premises, under the restrict

in the footing of a purchaser or purchasers as afore-
 said person or persons, his, her, or their executors, ad-

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as hereinafter men-
 tioned, sell such part or parts
 of the said manors, messuages, lands,
 or hereditaments as
 eligible and necessary
 for the purpose of redeeming or
 paying such land tax, and, by
 or by indentures duly
 delivered, and enrolled
 in the High Court of Chancery in England within
 twelve calendar months after the
 date thereof in any of His
 Majesty's Courts of Record at
 Westminster, or in the Courts of
 the Archbishops of Canterbury
 or of Durham, or in the
 Court of Great Sessions in
 Wales, the case shall require,
 or in the counties of
 Middlesex and York in the
 manner required by law for con-
 veyances of real estates situated
 in the counties respectively,
 in proper deeds or other
 writings, to be executed and
 in the manner required
 by law of Scotland for estates
 in fee, absolutely to convey
 the same, freed and discharged
 of all land tax, unto any person
 or persons whomsoever; or to
 give a sufficient part of the
 said manors, messuages, lands,
 or hereditaments,
 or sum or sums of money
 as sufficient to redeem
 the same of the land tax charged
 upon the said manors,
 or lands, tenements, or
 hereditaments, and for securing
 the payment of such sum or
 sums of money, with interest, by

like indenture or indentures
 enrolled or registered as afore-
 said, to convey, surrender, or
 demise, by way of mortgage or
 other real security, such part of
 the said manors, messuages,
 lands, tenements, and heredita-
 ments, freed and discharged from
 land tax, as shall be a sufficient
 security for that purpose, to any
 person or persons who shall
 advance or lend such sum or
 sums of money upon the security
 thereof, his, her, or their heirs,
 executors, administrators, or as-
 signs, either in fee simple, or for
 any term or number of years; or,
 by like indenture or indentures
 enrolled or registered as afore-
 said, to grant, limit, or appoint
 any yearly sum or sums of money
 by way of a perpetual rent
 charge not exceeding the amount
 of the land tax charged upon the
 said manors, messuages, lands,
 tenements, or hereditaments, to
 be issuing out of, and charged
 and chargeable upon such ma-
 nors, messuages, lands, tenements,
 or hereditaments: Provided al-
 ways that nothing hereinbefore
 contained shall be construed to
 extend to authorise any sale, con-
 veyance, or mortgage, or grant
 of any rent charge by any arch-
 bishop or bishop, without the
 confirmation of the dean and
 chapter, or by any parson, vicar,
 or other person having any spi-
 ritual or ecclesiastical living or
 benefice, without the consent of
 the ordinary, and also of the

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ministrators, or assigns, shall have, hold, and enjoy t
 tax so redeemed by him, her, or them, as an annuity
 out of such manors, messuages, lands, tenements, an
 ditaments, (subject to such right and power of red
 thereof as hereinbefore is given to the person or
 beneficially entitled to the next estate or interest in
 sion, remainder, or expectancy, as and when such e
 interest shall vest in possession), and when any such

patron, if adult and within the
 realm; or by any curate of any
 perpetual curacy, without the
 consent of the person having
 the power of appointment to such
 curacy; or by any master or fel-
 lows of any college, or by any
 chapter of any cathedral or col-
 legiate church, master or guar-
 dian of any hospital, or any spi-
 ritual or ecclesiastical person or
 persons whatever, without such
 consent as by law was required
 for that purpose before the
 making of any statute or statutes
 for restraining the sales, convey-
 ances, mortgages, or grants of
 such persons, bodies politic or
 corporate, or any of them, or for
 disabling such persons, bodies
 politic or corporate, from making
 any such sales, conveyances, mort-
 gages, or grants, or any of them.

Sect. 64. "That it shall be
 lawful for the governors of the
 bounty of Queen Anne for the
 augmentation of the maintenance
 of the poor clergy, to lay out from
 time to time any sum or sums
 of money, which now are or here-
 after shall be applicable by them
 towards the augmentation of any
 living or livings, under and by
 virtue of any Act or Acts, law or

laws now in force, or of
 ter granted in the reign
 Anne for that purpose
 purchase of so much o
 centum Bank Annuities
 mentioned, as may be r
 for the redemption of
 tax charged, or hereaft
 charged in pursuance of
 Act of the present sessi
 the lands, tithes, or of
 fits arising from any l
 livings being within th
 ing of the said charter
 Act or Acts now in forc
 ing the application of su
 ty, and which land tax sh
 been contracted for wi
 time before limited by
 cumbent or incumbents
 living or livings, with
 sent of the said govern
 from time to time to tr
 the Commissioners for
 duction of the national d
 3l. per centum Bank A
 according to such contra
 such transfer of stock sh
 the quarter day preced
 making thereof, wholly e
 and discharge the lands
 or other profits of such l
 livings, from the payme
 land tax so redeemed."

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or persons as aforesaid shall not, at the time of entering into the contract for the redemption of such land tax, have declared his, her, or their option as aforesaid, whereby such manors, messuages, lands, tenements, or hereditaments, whereon the land tax shall have been charged, will, by virtue of this Act, be exonerated therefrom, such manors, messuages, lands, tenements, or hereditaments shall be and become chargeable for the benefit of such person or persons, his, her, or their executors, administrators, or assigns, with the amount of the 3*l*. per cent. Bank Annuities which shall have been transferred as the consideration for the redemption of the said land tax, and with the payment of such yearly sum or sums of money by way of interest thereon as shall be equal to the amount of the land tax redeemed: provided always, that no person or persons in remainder, reversion, or expectancy, or having any future interest as aforesaid, who shall afterwards, in order of succession, come into the actual possession, or be beneficially entitled to the rents and profits of such manors, messuages, lands, tenements, or hereditaments, shall be liable to the payment of any such annuity, or of any yearly sum or sums of money by way of interest as aforesaid, save only from the time he, she, or they shall come into possession or be beneficially entitled as aforesaid." Now, the estate of an ecclesiastical incumbent in possession of a living is not an estate of such a limited character as that specified in this section. The words "estate or interest in reversion, remainder, or expectancy" do not include the case of an ecclesiastical incumbent, who comes into the living by succession only. In *Com. Dig. tit. "Ecclesiastical Persons" (C. 9)*, it is laid down, that "The parson is seised in right of his church, and the freehold of the church, churchyard, and glebe belong to him: *Co. Litt. 300. b.* So, for the benefit of his church or successor, he shall be reputed to have the inheritance quodam modo; and therefore he may have waste, and declare *ad exhereditationem ecclesiæ: Co. Litt. 341. a.* So, he

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shall have a writ of mesne, or a contra formam feoffame Co. Litt. 341. b." In pleading, the parson is said to "seised in his demesne as of fee," 2 Chitty on Pleading 406, referring to the forms given in Winche's Entries, 1. Now, unless this case falls within the scope of the 37th section, the plaintiffs have no right of action against this incumbent. It is a general rule, that an incumbent has power to charge the living, without the permission of patron and ordinary. The 37th section, taken in connection with the 8th, 12th, 13th, 14th, and 18th sections, shews that the estate of an incumbent in possession of the living is not such an estate as that contemplated by this statute. The word "inheritance" is to be understood as having reference to a particular estate of such a nature that some third party has the residue. [*Martin*, B.—The 64th section is against the defendant's construction. *Parke*, B.—The 18th section contains the words "successors;" what meaning do you attribute to the term?] It is merely used in its popular sense. [*Alderson*, B.—The 19th section clearly contemplates the purchase of the land tax by the clergy.] The defendant does not deny the power of an incumbent to purchase the land tax, but it is submitted that he cannot redeem the tax and charge the payment of the money on the living as a debt due on the land. He has no power to charge the benefice with the debt, payable with interest. If the defendant is liable, and unable to pay the amount out of his own property, it would become necessary that the living should be sold to pay the principal. [*Alderson*, B.—The successor is under no hardship whatever; for if this land tax had not been redeemed, he would still have had to pay it. He now has to pay the same amount by way of annuity. There is no other difference.] A bill might be filed in the Court of Chancery for the sale of the living. [*Martin*, B.—It must be assumed, that the Court of Chancery would do what is equitable between the parties.] In *Co*

ans v. Harris (a), it was held, that, under the 42 Geo. 3, c. 116, which, as the Court of Queen's Bench said, is a "statute in *pari materia* with, and, in a degree, in furtherance of stat 38 Geo. 3, c. 60," a remainderman in possession can compel the representatives of the tenant of a previous particular estate, who has redeemed the land tax, to receive the consideration money for such redemption with all arrears of interest, so as to free the land from the charge and payment of the interest to which it was subject, for the benefit of such tenant, under the 123rd section. The reasons for the decision in that case, given in the judgment of the Court, support the defendant's construction of the 38 Geo. 3, c. 60. [*Alderson, B.*—That case does not go to the extent, that a sale of the estate would be compelled, but only that it would be allowed.] The former incumbent must be taken to have made the living a present of the land tax. Lastly, the 5th section of the 39 Geo. 3, c. 6, does not alter the case. That section enacts, that, "where the land tax charged upon the glebe lands or tithes of any living, shall not have been redeemed by the incumbent thereof before the 25th day of March, 1729, then it shall be lawful for the patron of the advowson of such living, at any time after the said 25th day of March, to contract for the redemption of the land tax charged thereon, in the same manner in all respects as a person seised or entitled in remainder, reversion, or expectancy, is by the said Act entitled to contract: Provided always, that where such land tax shall have been redeemed by the incumbent of such living out of his own estate, or by the patron thereof, and such living shall not have been exonerated therefrom, it shall be lawful for the incumbent who shall next succeed to such living, at any time after his institution or induction, or donation thereto, to demand an assignment of such land tax from the preceding incumbent, or his representatives in case

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(a) 12 Q. B. 726.

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of his death, or from such patron, or his heirs or representatives, as the case may be, in the same manner as a person remainder, reversion, or expectancy is by the said Act : authorised to demand an assignment of any land tax, on his her estate or interest becoming vested in possession." The section merely empowers the patron to contract for the redemption of the *land tax*, but no power is given to contract for the charge created in lieu of the land tax. [*Parke, B.* The former Act says, that the land tax shall cease to exist upon its redemption; the section, in using the terms "assignment of such land tax," is to be taken as referring to the assignment of the charge. The difficulty arises from the inaccurate use of the terms. *Pollock, C. B.*—It means the assignment of an annual sum equal in amount to the land tax

Thrupp (Bramwell with him) contra.—It is clear that the 37th section of the 38 Geo. 3, c. 60, is applicable to the case of an ecclesiastical incumbent in possession redeeming the tax out of his own estate. And, if the language of the section were not sufficiently comprehensive to include the case of a succeeding incumbent, all doubt upon the subject is removed by the 5th section of the 39 Geo. 3, c. 6. The section contemplates some cases in which the incumbent had redeemed the tax out of his own estate, and others in which he had not done so. The plaintiffs are satisfied to rest their claim upon these sections. It is to be observed, that there are numerous provisions in the statutes, both prior and subsequent to the 42 Geo. 3, c. 116, respecting assignments of such contracts to parties next in occupation, cases where the land is not exonerated from the land tax but there are no such provisions in cases where the land is exonerated. This is important. The 18th section of the 38 Geo. 3, c. 60, is the first enactment which contains such a provision; and the concluding part of that clause shews that it only applies in cases where the land was not exonerated. The following statutes contain similar provisions

sions: 39 Geo. 3, c. 6, ss. 5 and 21; 39 & 40 Geo. 3, c. 30, s. 5; 41 Geo. 3, c. 28, s. 7; and 42 Geo. 3, c. 116, s. 91. So that no enactment is to be found in any statute providing for the purchase of the charge created in lieu of land tax. The reason for this omission is given in *Cousins v. Harris* (a). Moreover, the incumbent is a person having "such a benefit of preference" as is mentioned in the clauses preceding the 7th section of the 38 Geo. 3, c. 60; and he is not entitled to "an estate of inheritance," for the fee of a rectory is "in abeyance:" Co. Litt. ss. 645, 646. And, according to the language of pleading, "he is seised in his demesne as of freehold." The words "estate of inheritance" must be construed with reference to the particular clause in which they are found: per Lord Eldon, L. C., in *Ware v. Pollard* (b). The words here mean an estate in fee simple. Several authorities might be cited to shew that an assignment of the land tax does not sink into the real estate, but continues part of the personal estate, unless there be an express declaration to the contrary: *Trevor v. Trevor* (c) and *Blundell v. Stanley* (d); so that this incumbent cannot, in the absence of such a declaration, be taken to have presented the living with the tax. The defendants are not subject to any hardship by the present mode of proceeding; for, if the tax had not been redeemed, they would have had to pay an equal annual sum to Government. They have now to pay the same amount to the representatives of the incumbent who redeemed the tax. They stand in the same situation as the owners of any other lands not ecclesiastical which have been exonerated. *Cousins v. Harris* (a) merely decides that any succeeding incumbent may purchase the plaintiff's interest, and transmit it to his family. The plaintiff's claim is in effect an assignable mortgage debt. The action is not

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(a) 12 Q. B. 726.

(b) 11 Ves. 276.

(c) 2 My. & K. 675.

(d) 3 De G. & S. 433.

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brought for the recovery of the principal, but only of the interest due upon it. The 45 Geo. 3, c. 77, s. 1, and the 53 Geo. 3, c. 123, s. 9, also dispose of the argument based upon the hardship of the proceeding. If, then, the incumbent for the time being had the right to charge the land for the benefit of his executors, administrators, and assigns, it follows that succeeding incumbents become liable to pay the amount accruing due from the time when he came into possession. The plaintiffs have a benefit given them by statute, and such a priority of contract as is sufficient to support an action for the recovery of the arrears: *Hopkins v. Mayor of Swansea* (a). And further, the 24th section of the 39 Geo. 3, c. 6, in substance enacts, that, where the representatives of redemptioners are entitled to receive the amount of the land tax redeemed as an annuity, they shall have the same remedies as landlords, and so shall rever-sioners (not declaring their option to be considered as purchasers), till their estates vest in possession. The plaintiffs have adopted the milder remedy, and therefore the technical objection raised by the defendant to their rightful claim ought to meet with the less favour with the Court.

Willes replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—The question raised by this demurrer is, whether the plaintiffs, the personal representatives of Dr. Kilderbee, who in 1798 redeemed the land tax charged on the rectory of Trimley, in the county of Suffolk, have a right as against the defendant, the successor to that benefice, to recover the amount due as interest on the amount of 3 per cent. Consols transferred by Dr. Kilderbee to the

(a) 4 M. & W. 621, 8 M. & W. 901, in error.

commissioners of the national debt for that purpose ; and we are of opinion that they have.

The record states that Dr. Kilderbee did not, in his contract with the commissioners for the redemption of the national debt, declare his option to be considered as a purchaser of the land tax. He redeemed it out of his own estate ; and by the provisions of the 38 Geo. 3, c. 60, s. 37, had that option, but did not exercise it.

By that clause, it is provided that such persons who shall not, at the time of entering into such contract, so declare their option, whereby (as the section expresses it) the premises whereon such land tax shall have been charged will, by virtue of this Act, be exonerated therefrom, such premises shall (obviously in lieu of the former land tax) be and become chargeable for the benefit of the persons so redeeming the land tax and so exonerating the premises, their executors, administrators, or assigns, with the amount of the 3 per cent. Consols transferred, and with the payment of such yearly sum, by way of interest thereon, as shall be equal to the amount of the land tax redeemed.

Now, the defendant contends, that this provision does not extend to persons who, like him, do not come in by way of remainder, reversion, or expectancy, but by succession only. We think, however, that the words which follow, " or persons having any future interest as aforesaid, who shall afterwards, in order of succession, come into actual possession," are quite sufficient to include his case ; and that when the proviso declares, that such persons shall not be charged with the payment of this interest, save only from the time they come into possession, it does virtually enact, that they shall pay it from that time to the representatives of the person who has so redeemed the land tax on the estate.

And this construction of the 37th section, and its application to those who, like the present defendant, take thus by succession, is, we think, strongly confirmed by the 18th

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section of 38 Geo. 3, c. 60, as explained and amended 39 Geo. 3, c. 6, s. 5.

By the 18th section of 38 Geo. 3, c. 60, which in terms tends to those who take interests in succession, remainder, reversion, or expectancy, or as substitute heirs of entail where purchasers (third persons not having interest in premises charged) shall have contracted for the purchase of the land tax, these persons before enumerated are authorised to demand from the original contractors an assignment of their contracts; and then it proceeds (but apparently from some inadvertency omitting persons in succession) to enact, that those in remainder, reversion, or expectancy shall be empowered to demand an assignment from the proprietors of the land tax after the contract executed to them. This inadvertency or intentional omission of persons taking by succession is remedied by the 39 Geo. 3, c. 6, s. 5; and this latter right and privilege is extended to incumbents, &c., of livings, who shall have redeemed the land tax out of their own estate, and not exonerated the living therefrom. Now, this clearly refers to the former part of the 37th section of the 38 Geo. 3, c. 60, where the incumbent redeeming declares his option to be treated as a purchaser of land tax, for then only is the living not exonerated from the land tax; and in that part of the section the power to have the assignment is confined to those having the estate in remainder, reversion, or expectancy; and this, therefore, required the assistance of other words to extend its provisions to persons taking by succession. Those words are, in fact, added by the 39 Geo. 3, c. 6, s. 5. But we think this almost amounts to a legislative exposition that the more extensive words "or persons having any interest therein who shall afterwards, in the order of succession, come into actual possession," had already been provided for the present case, and rendered it unnecessary to add it to the case provided for by 39 Geo. 3, c. 6, s. 5.

We therefore think, that, according to the true construction of the 38 Geo. 3, c. 60, s. 37, Dr. Kilderbee's representatives have a right to recover in this case. This living, we think, is now, in the hands of the defendant, chargeable with the amount of 3 per cent. Consols, transferred in exoneration of the land tax, and with the interest thereon.

Whether the Court of Chancery have the power of enforcing the charge as to the principal stock was suggested as a difficulty. It is not necessary to determine that; but, as the 19th section keeps up all the disabilities on ecclesiastical persons transferring any portion of their estates provided by the disabling statutes, we think it probable that the Court of Chancery would not so interfere, and that they would hold that the mention of this amount of 3 per Cents. is only to shew on what terms the successor may, if he so pleases, redeem the annuity or interest; and that all that he can be compelled to pay is the interest, equal in amount to the land tax formerly charged on the living. This is in conformity to the whole scheme pervading the Act for the redemption of the land tax, and does complete justice to both parties. Whatever question might have arisen on the 37th section in the first statute is entirely removed by the passing of the second statute of 39 Geo. 3, c. 6, s. 5.

If the defendant is liable, as we think he is, to this payment of interest, Mr. *Willes* seems to have conceded that the plaintiffs are entitled to the judgment.

The judgment must therefore be for the plaintiffs.

Judgment for the plaintiffs.

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DRAYSON and Another v. ANDREWS.

Under the 33rd section of the Common Law Procedure Act, (1854), 17 & 18 Vict. c. 125, the grounds upon which a rule nisi is obtained for a new trial, or to enter a verdict or nonsuit, must be *specifically* stated in the rule; and therefore a rule nisi for a new trial, on affidavits stating that the rule was granted "on the grounds set forth in the affidavits annexed" is insufficient.

The Court has power to order the rule to be amended on cause being shewn against it.

IN this case a rule had been obtained, calling on the defendant to shew cause "why, on payment of costs, a verdict found for the defendant on the trial of this cause, and the judgment signed thereon, shall not be set aside, and a new trial had, unless the defendant would consent to a nonsuit being entered *on the grounds set forth in the affidavits annexed*."

M. Chambers (*Hawkins* with him) appeared to shew cause.—There is a preliminary objection to this rule that it does not comply with the requirements of the Common Law Procedure Act, (1854), 17 & 18 Vict. c. 125, s. 33, which enacts, that, "in every rule nisi for a new trial, or to enter a verdict or nonsuit, the grounds upon which such rule is obtained shall be shortly stated therein." The rule contains no grounds whatever, but merely refers to the affidavits annexed. The Court of Queen's Bench refused to amend the rule, holding that the rule should state specifically the grounds with precision. [*Parke, B.*—Does the same reason apply in a case in which there is no appeal from the decision of the Court in which the motion for a new trial is made? The 35th section provides, "that where the application for a new trial is upon a *matter of discretion only*, as on the ground that the verdict was against the weight of evidence or otherwise, no such appeal shall be allowed." The Legislature intended that the rule should give some information to the opposite party, to obviate the inconvenience which otherwise arises from the perusal of very voluminous affidavits for the purpose of ascertaining upon what ground the rule is founded. In the present case, the plaintiffs made affidavits upon various matters; they may rely upon surprise, or the absence of sufficient evidence to support the verdict, or upon fresh evidence discovered since the trial. The p

with respect to motions to set aside awards, is analogous ; and, by the Reg. Gen. Hil. Term, 1853, r. 169, where a rule to shew cause is obtained to set aside an award or an annuity, the several objections thereto, intended to be insisted upon at the time of moving to make such rule absolute, shall be stated in the rule to shew cause." [*Alderson*, B. —It is very reasonable that the party who has to shew cause should know what he has to meet. Can we not allow the rule to be amended, by inserting the grounds?] As *amicus curiæ*, I should suggest that the rule should be amended, and that the case should stand over till next Term.

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Knowles (*Griffiths* with him) contra, contended that the rule was sufficient.

SED PER CURIAM (a).—We are all of opinion that the rule is insufficient, but that we have power to order it to be amended, and we do so ; the costs to be costs in the cause. It is a matter of some importance, and it is right that the practice should be settled (b).

Rule amended and enlarged accordingly.

(a) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Martin*, B.

(b) *Knowles* proposed that the rule should be amended by striking out the words "set forth in the affidavits annexed" and by inserting in lieu thereof the words "that, since the trial of his cause, the plaintiffs have discovered new and material evi-

dence of a partnership between the defendant and *James Pugh*, and also of a ratification by the defendant of the acts of the said *James Pugh* in his dealings with the plaintiffs in relation to the subject of this action." The Court said, that this was a sufficient statement of the grounds.

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ROGERS v. HUNT.

In an action on a bill of exchange, the writ was specially indorsed for 31*l.* 8*s.* 9*d.* "being balance of principal, interest, and expenses of noting, due on a bill of exchange for 75*l.* 9*s.* dated &c.:—*Held*, that the expenses of noting were not "a liquidated demand" within the 27th section of the Common Law Procedure Act, (1852), 15 & 16 Vict. c. 76, and consequently, that the indorsement was irregular, and the plaintiff was not entitled to sign final judgment under the 29th section, on the failure of the defendant to enter an appearance within the specified time.

IN this case the writ of summons was served on of last October. The writ was specially indorsed sum of 31*l.* 8*s.* 9*d.* claimed as due "for balance of interest, expenses of noting, and commission, due of exchange for 75*l.* 9*s.*, dated 8th June, 1854, and by defendant." Shortly after the expiration of the appearance, the plaintiff's attorney searched for an appearance, when he found that none had been entered, waited, however, till the 4th of November, when a final judgment. Shortly afterwards, he received from the defendant to inform him that previously, on the morning of the 4th, an appearance had been entered by the plaintiff having, nevertheless, issued execution, was subsequently made at chambers by *Martin* set aside the judgment and execution, on the ground of irregularity.

In the present Term *Doyle* had obtained a rule to rescind that order.

Dowdeswell now shewed cause.—First, the plaintiff was not entitled to sign judgment without the declaration. The special indorsement is not such as is contemplated by the 25th section of the Common Law Procedure Act, (1852), 15 & 16 Vict. c. 76. That section provides that, "in all cases where the defendant resides within the jurisdiction of the Court, and the claim is for a liquidated demand in money, with or without arising upon a contract, express or implied, or on a bill of exchange, promissory note, or on other simple contract debt, or on a bond or under seal for payment of a liquidated amount or on a statute where the sum sought to be recovered is a liquidated sum."

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a fixed sum of money, or in the nature of a debt, or on a guarantee, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, the plaintiff shall be at liberty to make upon the writ of summons and copy thereof a special indorsement of the particulars of his claim, in the form contained in the Schedule (A) to this Act annexed, marked Number 4, or to the like effect; and when a writ of summons has been indorsed in the special form hereinbefore mentioned, the indorsement shall be considered as particulars of demand, and no further or other particulars of demand need be delivered, unless ordered by the Court or a Judge." Where the plaintiff has complied with this section, he is entitled, under the 27th section, in case of the non-appearance of the defendant, and upon observing certain requisites there mentioned, at once to sign final judgment. Now, this special indorsement is not for "a liquidated claim," for the plaintiff had no right to claim the expenses of noting. It does not appear that the instrument is a foreign bill. The Court will not allow the expense of noting to be recovered against the acceptor, unless it be laid as special damage in the declaration (a).—Secondly, the plaintiff could not sign judgment after the defendant had entered an appearance: 15 & 16 Vict. c. 76, s. 29.—He also contended, that, upon the facts disclosed in the affidavits, the plaintiff was not entitled to sign judgment, inasmuch as proceedings for a compromise were at that time going on.

The Court then called upon

Doyle, in support of the rule, who contended that the writ was indorsed for a claim in respect of the balance of a liquidated demand.

(a) *Hobbs v. Christmas*, cited in *Byles on Bills*, p. 203, n.; *Kendrick v. Lomar*, 2 C. & J. 405.

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PARKE, B.—It should appear upon the face of *the* indorsement itself that the claim is for a liquidated demand. The plaintiff had no right, under the 27th section of the statute, to add a claim for the expenses of noting. He could not recover these expenses by this mode of proceeding. The indorsement must, therefore, be treated as a nullity, and the plaintiff must declare. The judgment and execution being irregular, my Brother *Martin's* order was right, and this rule must be discharged.

POLLOCK, C. B., ALDERSON, B., and MARTIN, B., concurred.

Rule discharged.

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TEMPANY (a Pauper) v. RIGBY and Others.

A plaintiff cannot countermand notice of trial after the cause has been made a remanet.

HAWKINS had obtained a rule, calling on the plaintiff to shew cause why he should not pay to the defendants the costs of the day for not proceeding to trial, in pursuance of notice; and why all further proceedings should not be stayed until such costs should be paid.—It appeared that the plaintiff was a pauper, and that issue was joined in the cause on the 6th of June last; that notice was then given for the trial of the cause, at the Middlesex Sittings after last Trinity Term. The defendants delivered briefs to counsel. The cause was

Pearson shewed cause.—The first question is, whether the 122nd rule of the New Rules of Hilary Term, 1853, applies to this case. That rule orders, that, “where a pauper omits to proceed to trial pursuant to notice, he may be called upon by a rule to shew cause why he should not pay costs, though he has not been dispaupered, and why all further proceedings should not be stayed until such costs shall be paid.” There is no reason why a harder measure of justice should be dealt to a pauper than to a solvent plaintiff. [*Parke, B.*—That rule applies only to the case where the plaintiff would be liable to costs if he had not been a pauper.] Secondly:—the notice that the plaintiff gave on the 30th of October amounted to a notice of countermand.

Hawkins in support of the rule.—A plaintiff cannot countermand his notice of trial after the cause has been made a remanet; and here the defendants have been put to expense. [*Martin, B.*—The form of the notice is, “Take notice of trial for the Sittings within this present Term, or as the case may be.”] The notice of trial given in this case had operated before the notice of the 30th of October.

PER CURIAM (a).—The rule must be absolute. The plaintiff cannot countermand his notice of trial after the cause has been made a remanet.

Rule absolute.

(a) *Parke, B., Alderson, B., and Martin, B.*

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Nov. 16.

MARTIN v. HEMMING.

Under the 51st section of the Common Law Procedure Act, (1854), 17 & 18 Vict. c. 125, which empowers the Court to allow a party to deliver (before declaration by the plaintiff, and before plea by the defendant) written interrogatories to his adversary to be answered by him, the Court will not exercise that power by allowing a defendant to deliver interrogatories *before plea*, except under special circumstances, as, for instance, where the defendant makes out a case of urgent necessity.

Quære, whether the right to deliver interrogatories under that section, is confined to such cases as would have afforded ground for a bill of discovery in a Court of equity.

QUAIN moved for a rule calling on the plaintiff to show cause why the defendant should not be at liberty to deliver the interrogatories in writing hereinafter mentioned to the plaintiff, and why the plaintiff should not answer them.

It was an action on a bill of exchange drawn by one Peter Martin upon and accepted by the defendant, and indorsed by the drawer to the plaintiff. After the delivery of the declaration, and *before plea* pleaded, a summons had been taken out, before *Martin, B.*, at Chambers, for leave to deliver certain interrogatories; but the parties were referred to the Court by the learned Judge. The interrogatories were as follows:—

1. When was the bill in the declaration in this cause mentioned first indorsed to you?
2. Was it at the same or any other time actually delivered to you; and if the latter, when was it so delivered?
3. Was there any consideration for such indorsement to you; if so, state what the consideration was, and when it passed; and, if there was a money consideration, how and when it was paid, and whether in gold, notes, or by cheque; and, if by cheque, on what bank and of what date?
4. Did you at any time indorse away the bill to any other person or persons; and, if so, to whom, and when, and for what, if any, consideration?
5. Who was the holder of the bill when it became due?
6. Did you receive any notice of dishonour of the bill; and, if so, from whom, and when?
7. If you were not the holder of the bill when it became due, did you take it up; and, if so, when, or who took it up?
8. Was it taken up by Peter Martin; and, if so, when?

And did he deliver it to you after he had so taken it up; and, if so, when, and for what purpose?

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9. Did you know that the defendant and his creditors have entered into a deed of arrangement for winding up his affairs, according to the Bankrupt Law Consolidation Act, 1849; if so, when did you first become acquainted with the fact that he had entered into such deed of arrangement, and how, and from whom did you learn such fact?

10. Did you know that the said deed was signed by Mr Martin and by the Borough Bank of Liverpool; and, if so, when did you first become acquainted with that fact, and by whom or in what way were you informed of it?

11. What is your calling and business, and where do you reside and carry on such business? What relation, if any, are you to Peter Martin? Are you in partnership with him, or do you carry on business in the same house or office as Peter Martin?

The motion was founded on an affidavit of the defendant and his attorney in the form required by the 52nd section of the Act; and on another affidavit of the defendant, which stated that the plaintiff was the father of Peter Martin, the drawer of the bill; that they occupied one office; that he believed the drawer discounted the bill with the Borough Bank of Liverpool, who were the holders thereof when it became due, but was ignorant when or where or on what terms the indorsement was made to the plaintiff; that he believed, that, when the bill became due, it was taken up from the bank and paid by Peter Martin, who produced at the same time the notice of dishonour which had been sent by the bank to the plaintiff; that the defendant had no knowledge that the bill had been indorsed to the plaintiff, or that he was the holder thereof or a party thereto, until a day or two after it had been taken up from the bank, when the plaintiff applied to the defendant for payment of it; that, before the bill became due, the defendant executed a

ers of the bill, who executed the deed in respect of the bill as well as of other matters; that, at the time that deed was executed, the defendant had no knowledge or notice that the bill had been indorsed to the plaintiff, or that he was a party to it, or in any way connected with the transaction; also that the defendant had reason to suspect and believe, and did suspect and believe, that the plaintiff was suing on the bill merely as the agent or trustee of Peter Martin, who was thus endeavouring to evade the deed of arrangement; and that the defendant had also good reason to suspect and believe, and did suspect and believe, that there was no consideration for the indorsement of the bill to the plaintiff; and that the plaintiff at the time of such indorsement had notice of the deed of arrangement, and that the bill had been executed by Peter Martin and the bank, and all the circumstances connected therewith; and that, subsequently and after the execution of the deed of arrangement, the defendant offered a composition of 10s. in the pound to his creditors, which had been accepted by all of them, and among others by Peter Martin, in respect of the bill on which the action was brought.—There was also an affidavit verifying the above-mentioned deed of arrangement, and likewise an assignment by the defendant to certain creditors named in that deed of all his estate and effects for the benefit of his creditors.

duce an entirely new mode of proceeding. And it is
 tted, that, under the provisions of those enactments,

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with the declaration, and
 defendant may, with the
 either of them by leave
 the Court or a Judge, at
 other time, deliver to the
 the party or his attorney
 ided such party, if not a
 corporate, would be liable
 called and examined as a
 upon such matter) inter-
 series in writing upon any
 as to which discovery
 be sought, and require such
 or in the case of a body
 rate any of the officers of
 body corporate, within ten
 to answer the questions in
 g by affidavit, to be sworn
 led in the ordinary way ;
 any party or officer omit-
 without just cause, suffi-
 y to answer all questions
 which a discovery may be
 t within the above time,
 sh extended time as the
 or a Judge shall allow,
 be deemed to have commit-
 contempt of the Court, and
 be liable to be proceeded
 it accordingly.

t. 52 : "The application for
 shall be made upon an
 rit of the party proposing
 errogate, and his attorney
 nt, or, in the case of a body
 rate, of their attorney or
 , stating that the deponents
 ponent believe or believes
 the party proposing to in-
 gate, whether plaintiff or
 ant, will derive material
 t in the cause from the

discovery which he seeks, that
 there is a good cause of action
 or defence upon the merits, and,
 if the application be made on
 the part of the defendant, that
 the discovery is not sought for
 the purpose of delay : provided
 that where it shall happen, from
 unavoidable circumstances, that
 the plaintiff or defendant cannot
 join in such affidavit, the Court
 or Judge may, if they or he
 think fit, upon affidavit of such
 circumstances by which the party
 is prevented from so joining
 therein, allow and order that the
 interrogatories may be delivered
 without such affidavit.

Sect. 53 : "In case of omis-
 sion, without just cause, to an-
 swer sufficiently such written
 interrogatories, it shall be lawful
 for the Court or a Judge, at their
 or his discretion, to direct an
 oral examination of the interro-
 gated party, as to such points as
 they or he may direct, before a
 Judge or Master ; and the Court
 or Judge may, by such rule or
 order, or any subsequent rule or
 order, command the attendance
 of such party or parties before
 the person appointed to take
 such examination, for the pur-
 pose of being orally examined as
 aforesaid, or the production of
 any writings or other documents
 to be mentioned in such rule or
 order, and may impose therein
 such terms as to such examina-
 tion, and the costs of the appli-
 cation, and of the proceedings

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a party is entitled to deliver interrogatories to all such persons as could be called as witnesses on the trial, and to require an answer to all such questions as must be answered by a witness in the witness-box. The rules by which the system of discovery in equity is governed do not strictly apply to the present system, introduced for the first time by this statute. The rules observed in Courts of Equity were applicable to a state of things when the parties to the suit were not examinable at law. The system under which the parties themselves could not be examined no longer exists; and, unless this new enactment is to be strictly construed, there is no reason why the equitable rules should be held applicable to this novel practice. The language of the sections referred to is very general. The 14 & 15 Vict. c. 99, which related to the inspection of documents, by section 6 enacts, that "Whenever any action or other legal proceeding shall henceforth be pending in any of the superior Courts of Common Law at Westminster or Dublin, or in such Court, and each of the Judges thereof, may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which, previous to the passing of this Act, a discovery might have been obtained by filing a bill, or by any other proceeding in a Court of Equity, at the instance of the party making application as aforesaid to the said Court or Judge. By that enactment, therefore, the mode of proceeding was confined to the same course of practice as that observed in

thereon, and otherwise, as to such Court or Judge shall seem just."

Sect. 54 enacts that such rule or order shall have the same force

and effect, and may be proceeded upon in like manner, as an order under the 1 Will. 4, c. 22.

as the word "discovery," but that term is not to be used in the same sense as it is understood in Courts of equity. The words "provided such party would be to be called and examined as a witness upon such facts," shew that the word "discovery" cannot be so understood. The rules of equity, therefore, were only applicable to a state of things where the party could not be examined at law. In Wigram on Discovery, 2nd edit., it is said, that "the danger of perjury, as will here-be seen, is the foundation of a settled rule of practice, which the right of a party to discovery is limited to the degree necessary to sustain his own case, to the exclusion of that by which the case of his opponent exclusively may be sustained;" and again, at p. 265, it is said: "If it were now, for the first time, to be determined whether, in the investigation of disputed facts, truth would best be ascertained by allowing each of the contending parties to know the state of the trial in what manner and by what evidence his own case may be proposed to establish his own case, arguments of great weight might, a priori, be adduced in support of either the affirmative or the negative of this important question. Experience, however, has shewn—or, (at least), Courts of justice in this country act upon the principle—that the possible mischiefs arising from surprise at a trial are more than counterbalanced by the danger of perjury, which must inevitably be incurred if either party is permitted before a trial to know the evidence against which he has to contend and ac-

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a party is entitled to deliver interrogatories to all such persons as could be called as witnesses on the trial, and to require an answer to all such questions as must be answered by a witness in the witness-box. The rules by which the system of discovery in equity is governed do not strictly apply to the present system, introduced for the first time by this statute. The rules observed in Courts of Equity were applicable to a state of things when the parties to the suit were not examinable at law. The system under which the parties themselves could not be examined no longer exists; and, unless this new enactment is to be strictly construed, there is no reason why the equitable rules should be held applicable to this novel practice. The language of the sections referred to is very general. The 14 & 15 Vict. c. 99, which related to the inspection of documents, by section 6 enacts, that "Whenever any action or other legal proceeding shall henceforth be pending in any of the superior Courts of Common Law at Westminster or Dublin, &c., such Court, and each of the Judges thereof, may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the

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Courts of Equity. But the 50th section of the 17 & 18 Vict. c. 125, which relates to the discovery of documents, has no such limitation. It is true, that the 51st section contains the word "discovery;" but that term is not to be construed in the same sense as it is understood in Courts of Equity. The words "provided such party would be liable to be called and examined as a witness upon such matter," shew that the word "discovery" cannot be so understood. The rules of equity, therefore, were only applicable to a state of things where the party could not be examined at law. In Wigram on Discovery, 2nd edit., p. 4, it is said, that "the danger of perjury, as will hereafter be seen, is the foundation of a settled rule of practice, by which the right of a party to discovery is limited to the evidence necessary to sustain his own case, to the exclusion of that by which the case of his opponent exclusively may be sustained;" and again, at p. 265, it is said: "If it were now, for the first time, to be determined whether, in the investigation of disputed facts, truth would best be elicited by allowing each of the contending parties to know before the trial in what manner and by what evidence his adversary proposed to establish his own case, arguments of some weight might, *a priori*, be adduced in support of the affirmative of this important question. Experience, however, has shewn—or, (at least), Courts of justice in this country act upon the principle—that the possible mischiefs of surprise at a trial are more than counterbalanced by the danger of perjury, which must inevitably be incurred when either party is permitted before a trial to know the precise evidence against which he has to contend; and accordingly, by the settled rules of Courts of justice in this country (approved as well as acknowledged), each party in a cause has thrown upon him the onus of supporting his own case, and meeting that of his adversary, without knowing beforehand by what evidence the case of his adversary is to be established or his own opposed." The statute in

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question, therefore, gives a larger power than that which existed under the practice of discovery,—the leave of the Court being essential, as a check upon any improper advantage being taken of such liberty. [*Parke, B.*—There is very good reason why such leave is necessary, for otherwise interrogatories would be added in all cases, and would be delivered with every declaration and every plea; and this power is, therefore, given to the Judges to prevent expense from being unnecessarily incurred. We must, therefore, see in each case that the interrogatories are necessary. The defendant contends, that the power given by this statute is more extensive than that which is given by bill of discovery.] The word “discovery” merely means “information.” The view which the Common Law Commissioners took of this subject, as expounded in their Report, may be referred to as an argument for, and as part of the argument of, the defendant. It is there said: “We propose, that either party in a cause shall be at liberty to deliver to the opposite party, provided such party would be liable to be called as a witness, or his attorney, written questions on the subjects on which discovery is sought, and to require such party, within a time to be fixed, to answer the questions in writing upon oath, sworn and filed in the same manner and under the same sanction in case of falsehood, as an affidavit, and that the party omitting to answer within the prescribed time shall be subject to the consequences of a contempt of Court.” The object of the statute is to give a party the opportunity of obtaining information as to the real facts of the case, so as to enable him to frame his case properly, and to give him the means of judging whether he has any chance of success, so that he may either proceed with or abandon the cause of action or the defence, in cases where he is respectively plaintiff or defendant. It may be further objected, on the part of the plaintiff, that this application is premature, it being *before* plea. But the 51st section does not preclude the delivery of the inter-

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interrogatories from being made before plea. The words "or at any other time" provide for this case. [*Alderson, B.*—The words are "provided such party would be liable to be called and examined as a witness upon such matter." How can we say, that the plaintiff is liable to be examined upon a matter unless we know what it is. Here there are no pleas. If the acceptance of the bill is not denied, he could not be examined as to that. The words "to be examined" have reference to the trial. If we knew what the issue must necessarily be, the case might be different.] The 51st section says, that the delivery of the interrogatories may be "with the declaration." [*Alderson, B.*—That refers to the plaintiff, and "the defendant may with the plea" refers to the delivery by the defendant.] Several cases might be cited, to shew that a commission to examine witnesses has been granted before issue joined: *Dowler v. Collis* (a), *Mondel v. Steele* (b), and *Finney v. Beesley* (c).

Aspland contra.—The 51st section entitles a plaintiff to deliver interrogatories to the defendant with his declaration, and the defendant may do the same with his plea; but if either party seeks to do so "at any other time," he should satisfy the Court of the necessity for such application. If the Legislature had intended that the delivering of interrogatories might be made at any time during the progress of the suit, they would have adopted language of a general character. It is, therefore, submitted, that a defendant must make out a case of urgent necessity to entitle him to such liberty before plea, otherwise the proceeding might be adopted for the mere purpose of delay, for a defendant thereby obtains an additional term of ten days to plead. *Finney v. Beesley* (c) is an authority in favour of

(a) 4 M. & W. 531. (b) 8 M. & W. 300. (c) 17 Q. B. 86.

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the plaintiff's view of the statute. It was there laid down that, under the 1 Will. 4, c. 22, s. 4, the general rule of practice is, that a commission to examine witnesses in a cause should not be granted before issue joined, although a case of extreme emergency may form an exception. The defendant does not make out any such ground. The word "discovery" is used in its technical sense, viz. in the sense in which it is understood in Courts of equity. The 50th section is an extension of the powers given by the 14 & 15 Vict. c. 99, s. 6, relating to the inspection of documents; and the 51st section provides for the discovery of evidence by the examination of witnesses through the medium of written interrogatories. In Story's Equity Juris., § 1497, it is laid down, that "no discovery will be compelled except of facts material to the case stated by the plaintiff; for otherwise he might file a bill and insist upon a knowledge of facts wholly impertinent to his case, and thus compel disclosures in which he had no interest, to gratify his malice or his curiosity, or his spirit of oppression. In such a case his bill would most aptly be denominated a mere fishing bill." Besides, the affidavits do not disclose a good defence to the action, even assuming the facts stated in them to be fully established; for it does not appear that the deed of arrangement was executed by creditors, the amount of whose debts was such as is required by the bankrupt law, or that the deed was executed before the transfer of the bill of exchange to the plaintiff.—He referred to *Tetley v. Taylor* (a).

Quain was heard in reply.

POLLOCK, C. B.—We are all of opinion that there ought to be no rule. I believe this to be the first time that the construction of this statute has come under the consideration of this Court. It is a very important statute, holding out

(a) 1 E. & B. 521.

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the prospect of a very considerable change in the practice of the Courts, and it is an enactment likely to advance the efficiency of their proceedings. I therefore think it right, that we should offer no opinion, nor even the semblance of one, on any part of this case, with reference to an enactment, on which a doubt may be fairly entertained, until the question is fully and fairly before us, in such a shape as to demand our decision. There are portions of the 51st section, which may possibly give rise to doubts. But upon these questions, of which some have been raised at the bar, and of which others have been intimated by the bench, I give no opinion whatever; for, I think that our decision upon them should be reserved to a time when it is called for. I think it perfectly clear, that the 51st section points to the time of the declaration as the proper period for the delivery of the written interrogatories by the plaintiff, and to the time of the plea as the period when they are to be delivered by the defendant. Whether or not, according to the true construction of this section, the Court has power to allow them to be delivered at other times—whether before or after declaration by the plaintiff, or before or after plea by the defendant—is immaterial for the present purpose, because I think that, upon these affidavits, that sort of case is not made out of extreme urgency, which, according to the principles laid down by the Court of Queen's Bench in *Finney v. Beesley* (a), is necessary. In this respect, as in others also, the affidavits are especially defective. Certainly, some inconvenience may arise from refusing a party that knowledge, which might have the effect of removing the necessity of his pleading at all, by shewing him that he has no defence; and, if the defendant had said, that, upon his being permitted to put the proposed questions, and upon their being answered in a particular manner, he would withdraw his defence to the action, that would have

(a) 17 Q. B. 86.

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afforded a much stronger reason for granting this rule than any at present suggested by him. But the defendant does not do anything of the sort. He does not even say, that he will act upon the answers which he seeks to receive to the interrogatories. It might, no doubt, be a matter of some convenience to parties, if they could, before declaration or plea, as the case may be, be permitted to ascertain all the facts of their case; but I think the inconvenience which would follow, would be greater, if a party were allowed to put such interrogatories at such a time, without shewing the urgent necessity for their allowance, as otherwise it is highly probable that, in many cases, the time of the Courts and of the Judges would be needlessly occupied in discussing the propriety of allowing such interrogatories. I am reminded by my Brother *Parke*, that another point has been raised, namely, as to the meaning of the term "discovery" in this section; but that is one which does not call for any decision, and, therefore, I cautiously abstain from giving any opinion whatever on that point. Assuming, however, the Court to have the power to allow a defendant to deliver interrogatories before plea, and that the discovery here sought for is within the meaning of this clause, we think that the defendant has not disclosed in his affidavits such special circumstances as are sufficient to entitle him to the leave he seeks.

PARKE, B., ALDERSON, B., and PLATT, B., concurred.

Aspland applied for costs; but the Court said the costs would be costs in the cause.

Rule refused (a).

(a) See *Osborn v. The London Dock Company*, and *Thol v. Lease*, post.

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Nov. 25.

GARTH moved for a rule calling on the plaintiffs to shew cause why the defendant should not be at liberty to plead several matters in this cause.—It was an action on an indenture of lease, by which the plaintiffs demised to the defendant a water mill, with a storehouse and machinery thereto belonging, a cottage and gardens, lands, buildings, premises and tenements, for a certain term of years, and at a specified rent. The declaration alleged that the defendant entered into possession under this demise, and laid, by way of breaches, first, the non-payment of the rent; and, secondly, the non-repair of the premises. The defendant had taken out a summons before *Martin*, B., at Chambers, for leave to plead the following pleas: The learned Judge was of opinion that the fifth plea ought not to be allowed, but he referred the matter to the Court.

To an action upon an indenture of lease for nonpayment of rent, and for non-repair of the premises, the defendant proposed to plead (inter alia) as a defence on equitable grounds, under the 17 & 18 Vict. c.125, s. 83, a plea to the effect, that it was agreed between the plaintiff and the defendant, that the latter should surrender the tenancy to the plaintiff, by yielding up possession of such

The proposed pleas were—First, as to the claim for rent and breaches of covenant since the surrender afterwards portion of the premises as was in the occupation of the defendant, and by permitting the plaintiff to receive all future rents of such part of the premises as was occupied by the defendant's tenants, and by permitting the tenants to attorn to the plaintiff, the defendant to pay a certain sum of money, and give up certain machinery, all of which was to be done by the defendant, and accepted by the plaintiff, in satisfaction of the covenants of the lease; and that the lease and counterpart should be respectively given up to be cancelled. The plea then alleged, that, in pursuance of such agreement, the defendant paid the plaintiff the said sum of money, and gave up the machinery, and delivered the lease to him, and that the plaintiff excused himself from delivering up the counterpart; that the defendant accordingly withdrew from the possession of the premises which he occupied, and had never since been in the enjoyment or occupation thereof, or in the receipt of the rents; and that he had always permitted the plaintiff to receive the same, and the tenant to attorn. The plea then contained an averment of performance by the defendant of all other conditions precedent, and that the defendant was ready and willing to do all things necessary to be done by him, for putting an end to the tenancy; and that the action was brought in fraud and breach of the said agreement, and that it was wholly the fault and laches of the plaintiff that the surrender was not completed.

Upon an application to plead several matters, the Court refused to allow this plea to be pleaded with other pleas, as not disclosing an equitable defence within the meaning of the 17 & 18 Vict. c. 125; on the ground that a Court of equity would require the execution by the defendant of a valid surrender of the term as a condition precedent to staying the action, and that the superior Courts of common law have no power to enforce such condition.

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mentioned, a surrender; secondly, as to the last breach, a traverse thereof; thirdly, as to the rent and breaches of covenant before the surrender afterwards mentioned, a surrender and the payment of a certain sum of money, and the relinquishment of certain machinery in consideration of the tenancy being put an end to, and in satisfaction and discharge of those breaches; fourthly, eviction before breach; and, fifthly, the following plea: "For defence on equitable grounds, the defendant says, that heretofore and before this suit, to wit, &c., it was agreed by and between the plaintiffs and the defendant in manner following, that is to say, that the defendant should surrender to the plaintiffs, that is to say, by the defendant absolutely yielding up to the plaintiffs the possession of so much of the said demised premises as was in the occupation of the defendant, and by suffering and permitting the plaintiffs to receive all future rents of so much of the said demised premises as were occupied by tenants of the defendant, to and for the plaintiffs' own use, and by suffering and permitting the said tenants to become and attorn tenants to the plaintiffs; and that the defendant should also pay to the plaintiffs, and the plaintiffs should accept from the defendant, the sum of 250*l.*; and that the defendant should relinquish and yield up to and in favour of the plaintiffs a large quantity of machinery, to wit, to the value of 2000*l.*, belonging to the defendant, and which was then in and upon the said premises, and that the plaintiffs should accept and take possession of such machinery accordingly; and that such surrender should be so made by the defendant and accepted by the plaintiffs, and that such sum of money should be so paid and accepted as aforesaid, and that such machinery should be so relinquished and accepted as aforesaid, in consideration of the said tenancy being so put an end to as aforesaid, and in satisfaction and discharge of all and every claim of the plaintiffs against the defendant under and by virtue of the said de-

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said and the covenants so made by the defendant as aforesaid; and that the defendant should deliver up to the plaintiffs the said indenture of lease to be cancelled, and that the plaintiffs should deliver up the counterpart of the said lease to the defendant for a like purpose: and the defendant further says, that, in pursuance of such agreement, he duly paid to the plaintiffs, and the plaintiffs then accepted and received from the defendant the said sum of £100, and that the defendant then also relinquished to and in favour of the plaintiffs the said machinery upon the terms aforesaid, and delivered up the said lease to the plaintiffs, and the plaintiffs received the said lease from the defendant for the purposes and on the terms aforesaid; and that the plaintiffs thereupon excused themselves from delivering up such counterpart as aforesaid, on the ground that the key of the desk in which the said counterpart was deposited was lost: and the defendant further says, that he accordingly withdrew from the possession of so much of the demised premises as he himself occupied, and has never been since that time in possession or occupation or the use or enjoyment thereof or any part thereof, or in receipt of the rents and profits of any part thereof, and that the plaintiffs had due notice of the premises, and the defendant enabled the plaintiffs to occupy, use, and enjoy the same; and that the defendant has always suffered and permitted the plaintiffs to receive on their own account, and appropriate to their own use, all such rents as aforesaid, and hath always suffered and permitted such tenants, and such tenants have always been and still are ready and willing to attorn and become tenants to the plaintiffs; and the defendant avers performance of all other conditions precedent, and that he hath always been ready and willing to do all other things on his part that ought to have been done for putting an end to the said tenancy, and as and by way of such satisfaction and discharge as aforesaid, and that this action has been nevertheless brought in fraud and in breach of the

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said agreement: and that it was and is entirely the fault and laches of the plaintiffs that such surrender was not completed."

Garth in support of the motion.—The defendant is entitled to place the fifth plea upon the record, under the authority of the 83rd section of the second Common Law Procedure Act, 17 & 18 Vict. c. 125 (a). The plea discloses an agreement made between the parties, and if it had been fully carried out, the transaction would have amounted to a surrender by operation of law. Now the defendant has performed all things which by the agreement he was bound to do; and the laches of the plaintiffs has been the sole cause why the agreement remained in part unperformed. In such case, a Court of equity would grant relief, by putting an end to the tenancy. [*Parke, B.*—Is there any authority for saying, that a Court of equity would grant relief absolutely and unconditionally? It is submitted, that it would; and, although there is no precise authority upon the point, still the principles upon which that Court proceeds are in favour of the defendant's position. [*Martin, B.*—If the plea is to be taken as setting up a surrender, it is bad, inasmuch as the surrender is not in writing, as is required by the Statute of Frauds.] The only reason why the agreement has not been carried out, arises solely from the laches of the plaintiffs. [*Parke, B.*—The Court of Chancery would not grant a perpetual injunction, except upon the condition that the defendant executed a legal sur-

(a) That section enacts, that "it shall be lawful for the defendant or plaintiff in replevin in any cause in any of the Superior Courts in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him

to such relief by way of defence, and the said Courts are hereby empowered to receive such defence by way of plea; provided that such plea shall begin with the words 'for defence on equitable grounds' or words to the like effect.'

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surrender.] If the plaintiffs had performed their part of the agreement, and had taken possession of the premises, that would have amounted to a surrender. [Alderson, B.—The better opinion seems to be, that there must be the intervention of a third party to create such a surrender. Parke, B.—Until the case of *Thomas v. Cook* (a), it was never supposed that the acts of the parties themselves would amount to a surrender by operation of law. It is not now necessary to say whether that decision was right or not. This point was discussed in the judgment of this Court in *Lyon v. Reed* (b). Alderson, B.—This is a case in which a Court of equity would possibly grant relief, by ordering the execution of a surrender; but the Court would require that to be done by the defendant as a condition precedent: we have no such power. The 86th section provides "that in case it shall appear to the Court, or any Judge thereof, that any such equitable plea or equitable replication cannot be dealt with by a Court of law, so as to do justice between the parties, it shall be lawful for such Court or Judge to order the same to be struck out, on such terms, as to costs or otherwise, as to such Court or Judge may seem reasonable." We cannot do justice between these parties, which a Court of equity would be fully competent to do, and would do by ordering a surrender to be executed. Parke, B.—In my opinion, the equitable defence allowed to be pleaded by this statute means such a defence as would in a Court of Equity be a complete answer to the plaintiffs' claim, and would, as such, afford sufficient ground for a perpetual injunction, granted absolutely and without any conditions. But, according to the statement in the plea, a Court of Equity would not interfere, except upon the condition of the execution of a valid surrender by the defendant. We have no machinery by which we can compel the execution of a surrender. The

(a) 2 B. & Ald. 119.

(b) 13 M. & W. 285.

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statute does not say that the Courts of Common Law may give relief on equitable conditions, but that a plea shall be allowed which discloses a defence upon equitable grounds.] As the plaintiffs' laches is the only cause why the agreement is not complete, a Court of Equity would grant relief upon the well-known principle of equity, that, as against a wrongdoer or defaulter, everything which ought to be done is presumed to have been done. This principle is expounded and illustrated in 1 Story's Equity Juris. s. 64, where it is said, "Another maxim, which it seems necessary to notice, is, that equity looks on all as done which ought to have been done. The true meaning of this maxim is, that equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as the parties might have executed them. But equity will not thus consider things in favour of all persons, but only in favour of such as have a right to pray that the acts might be done. . . . The most common cases of the application of the rule are under agreements. All agreements are considered as performed, which are made for a valuable consideration, in

fence.] The defendant pleads this plea at his own risk, and the plaintiffs may demur to it.

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PARKE, B.—It is a sufficient answer to the application to say, that, if the plaintiffs are to be barred by this equitable plea, they will be unable to get a surrender executed by the defendant. The defendant may plead the first four pleas without the fifth, or that plea by itself.

ALDERSON, B.—The 86th section contemplates the case of an equitable plea being struck out when it cannot be dealt with by the Court “so as to do justice between the parties.” That section applies to this case, as we have not the power to do what a Court of Equity would require as a condition precedent to granting an injunction. The fifth plea, therefore, ought not to be allowed with the other pleas.

MARTIN, B., concurred.

J. Brown, who appeared to shew cause in the first instance, applied for costs; but the Court refused them.

Rule refused (a).

(a) See *Steele v. Haddock*, post.

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Dec. 18.

ELLIOTT v. BISHOP(a).

By indenture, C. demised to the plaintiff an unfinished messuage for the term of ninety-seven years. The indenture contained a covenant by the plaintiff, that, at the expiration of the term, he would deliver up the demised premises unto C., "together with all locks, keys, bars, bolts, marble and other chimney-pieces, foot-pieces, slabs, and other fixtures and articles in the nature of fixtures, which shall at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging." The plaintiff took

possession of and completed the messuage, and fitted it up with things necessary for carrying on the business of a tavern-keeper and licensed victualler; and for that purpose put in the premises certain fixtures of the description called and known as trade and tenant's fixtures. The defendant afterwards contracted with the plaintiff to purchase from him an underlease of the premises, and the goodwill, and also the furniture, fixtures, stock in trade, &c., at a valuation. In pursuance of this contract, the plaintiff executed to the defendant an underlease, which contained a covenant, on the part of the defendant, in the same words as the above covenant by the plaintiff in his lease.—*Held*, per *Parks*, B., that, under the above covenants, the plaintiff had no right to sell, and consequently the defendant could not remove, either the tenant's fixtures or the trade fixtures: Per *Platt*, B., that the covenants did not apply to either description of fixtures: Per *Martin*, B., that the covenants applied to the tenant's fixtures only, and not to the trade fixtures.

(a) Decided in Michaelmas Vacation, but inserted early on account of its importance.

THIS action was commenced by writ of summons to recover 573*l.* 16*s.* By consent and order of a Judge under the Common Law Procedure Act, 1852, the following case was stated, without any pleadings, for the opinion of this Court:—

The plaintiff is a builder, and the defendant a licensed victualler. By indenture of lease, bearing date the 18th of May, 1853, made between George Charles Marquis Camden of the first part; the Rev. Thomas Randolph, Prebendary of the Prebend of Cantlowes, otherwise Kentish Town, in the Cathedral Church of St. Paul, in London, of the second part; and the plaintiff of the third part: The said Marquis Camden, by virtue of the powers given to him by an Act of Parliament passed in the 53 Geo. 3, intituled "An Act for enabling the Prebendary of Cantlowes, in the Cathedral Church of St. Paul in London, to grant a lease, with powers of renewal, of the prebendal lands of Kentish Town, in the County of Middlesex," to and with the privity, consent, and approbation of the said Thomas Randolph, did demise and lease unto the plaintiff, his executors, &c., a certain piece or parcel of ground, in the indenture of lease fully mentioned and described, together with a brick messuage, then erected and covered in, upon the ground by the indenture demised, and described in the indenture as "The City of London," and all other buildings then subsisting or thereafter to be

pon the same ground: To hold the same for the pe-
 nyty-seven years and a half from the 25th of March,
 and under a certain yearly rent therein mentioned,
 ble as therein also mentioned. And the plaintiff
 by enter into divers covenants, and amongst others
 ant following, (that is to say:) The plaintiff in and
 id deed, for himself, his heirs, &c. did covenant,
 and agree to and with the said Thomas Randolph
 accessors, prebendaries of the prebend aforesaid,
 s a separate covenant to and with the said Marquis
 his executors, &c., that he the plaintiff should and
 the expiration or sooner determination of the said
 ceably surrender and deliver up the demised pre-
 to the said Marquis Camden, his executors, &c.
 with all locks, keys, bars, bolts, marble and other
 pieces, foot-paces, slabs, and other fixtures, and
 the nature of fixtures, which shall at any time
 e said term be fixed or fastened to the said demised
 or be thereto belonging.

ue of this demise the plaintiff entered upon the
 premises, and became possessed thereof for the
 o him therein granted; and afterwards, and after
 y, completed the messuage described in the deed
 'ity of London," and fitted up the same with things
 for carrying on therein the trade and business of
 keeper and licensed victualler; and for that pur-
 d to be put in and fixed to the said premises
 :tures of the description called and known as trade
 it's fixtures, and which said fixtures are set forth
 aerated in the schedule annexed to this case(u).

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schedule described
 s in each room and on
 ts of the premises.
 ie bed chambers and
 ms were principally
 ds, and cranks and
 ells. The following
 g others, in the —.

BAR.—The oak front of coun-
 ter. The top to do., &c. A 10-
 motion beer machine, in hard
 metal case. Two branches of
 waste pipe from counter to ma-
 chine. The hard metal covering
 of counter, 59 feet. Two hard
 metal rinsing basins, with brass

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These fixtures were fixed in and attached to the said premises, in the way trade and tenant's fixtures are ordinarily fixed and attached to dwelling houses, and would be removeable by the tenant for the time being, during or at the end of the said term, unless the covenant above set forth, or the covenant of the defendant hereinafter mentioned, precludes such removal. For the purposes of this case it is admitted, that all the articles mentioned in the schedule are either trade fixtures or tenant's fixtures. The said term is still unexpired, and the lease remains and continues a valid and subsisting lease.

On the 14th of November, 1853, the plaintiff caused to be put up the said demised premises for sale or lease by public auction for the term hereinafter mentioned, upon and subject to the following amongst other conditions:—Third: That, inasmuch as the rent at which the property was sold was an improved rent of 100*l.* per annum upon that reserved in the said lease to the vendor (which was 5*l.* per annum), the purchaser was to take his assurance from the vendor by way of underlease (to be prepared by and at the expense of such purchaser), for the whole term granted by the original lease to the vendor, less ten days, at a clear annual rent of 105*l.*; and that such underlease should, on the lessee's part, contain all and every the like or similar covenants, provisoes, reservations, conditions, and agree-

plugs and sockets; 26 brass serving cocks, &c. The whole of the Spanish mahogany cabinet work, with moulded cornices, with three plate glass panels. Two mahogany glazed cigar shew cases, with two silvered glass panels at back, hinges, &c. The framing to doors, with two circular cornices and carved mahogany filling in over, and circular enamelled plate glass panels. Two square pilasters with moulded capitals and bases. Three

glass shelves.

COFFEE ROOM.—Spanish mahogany shew board in window, with plate glass panel. Mahogany sample shelf, &c.

GAS FITTINGS.—The burners in lamps at front of house. Six standard burners in bar window. Two bracket burners for pipe lights. A very handsome six light chandelier in bar. A handsome two light telescope burner in Bar Parlour.

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ments, as are expressed, imposed, and contained on the lessee's part in the said original lease, or as near thereto as circumstances would permit. Seventh: That the purchaser should purchase, at a fair valuation to be made by two appraisers and two gaugers, or their respective umpires, to be chosen in the usual way, all the furniture, fixtures, stock in trade, and effects, in and upon the premises (notwithstanding any description contained in that particular), and should pay for the same, and for the time unexpired in the licenses and insurances, at the time of the completion of the purchase, upon the premises.

Upon such putting up of the said demised premises the same were not sold; but shortly afterwards the defendant agreed to become the purchaser thereof, under a written contract, indorsed on a copy of the said conditions of sale, and which agreement was then signed by the plaintiff, by his agent in that behalf, and the defendant. (The case set out the agreement, by which, *inter alia*, the defendant acknowledged that he had purchased the underlease and goodwill described in the annexed particulars of sale for 5750*l.*, and he agreed to pay "the amount of the valuations mentioned in the seventh condition, and to complete the purchase according to the annexed conditions of sale.")

Afterwards, and in pursuance of the said sale, and in performance of the contract between the plaintiff and the defendant, the plaintiff made and executed to the defendant an underlease of the said premises, for the whole of the term granted by the original lease to the plaintiff, less ten days, at the rent mentioned and specified in the conditions; and such underlease then contained all and every the like or similar covenants, provisoes, reservations, conditions, and agreements, as were expressed, imposed, and contained on the lessee's part in the said original lease, or as near thereto as circumstances would admit, and amongst others, the covenant, on the part of the defendant, following:—And also shall and will, at his or their own costs, as

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often as occasion shall require during the said term, well and sufficiently repair, maintain, point, paint, pave, purge, scour, cleanse, empty, amend, and keep the said demised premises with their appurtenances, and the brick walls and fences there to belonging, in substantial and tenantable state and condition; and in such state and condition shall and will, at the expiration or sooner determination of the said term, peaceably surrender and deliver up the same premises unto the plaintiff, his executors, &c., together with all locks, keys, bars, bolts, marble and other chimney-pieces, foot-paces, slabs, and all other fixtures, and articles in the nature of fixtures, which shall at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging.—And the defendant then accepted such lease; and the purchase was then completed between the said parties, except so far as relates to payment by the defendant for the fixtures as hereinafter mentioned.

By virtue of this underlease, the defendant has entered upon and became possessed of the demised premises for the term so to him granted, together with the fixtures so put in and fixed to the premises by the plaintiff, as aforesaid, and set forth and enumerated in the schedule to this case annexed.

These fixtures have been valued by two appraisers, in the usual way, in accordance with the said conditions, at the sum of 573*l.* 16*s.* It is agreed between the parties that this sum is the value of the whole of the fixtures in

detach or remove the tenant's fixtures, or the trade fixtures, from and off the demised premises, as the property of the defendant, without being guilty of a breach of the said covenant on his part in the underlease contained, or liable to an action at the suit of the Marquis Camden, or at the suit of the Rev. Thomas Randolph.

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If the Court is of opinion that this question should be answered in the affirmative, so far as relates to both the tenant's and the trade fixtures, then judgment is to be entered for the plaintiff for the sum of 573*l.* 16*s.*, being the value of the whole of the fixtures. If the Court is of opinion that this question should be answered in the affirmative, so far only as relates either to the tenant's fixtures or the trade fixtures, then judgment is to be entered for the plaintiff for the value only of that class of fixtures, such value being agreed upon as above mentioned. And if the Court is not of opinion that this question should be answered in the affirmative, either with respect to the tenant's fixtures or the trade fixtures, then judgment is to be entered for the defendant.

Bovill argued for the plaintiff (December 4).—There are three well-known descriptions of fixtures, viz. landlord's fixtures, tenant's fixtures, and trade fixtures. The covenant in question does not extend either to tenant's fixtures or to trade fixtures. Where particular words are followed by general ones, the rule is to construe them as applicable to persons and things ejusdem generis. Thus, the 6 Geo. 3, c. 25, s. 4, enacted, that, "if any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, shall contract with any person whomsoever, for any time or times whatsoever, and shall absent himself from his service before the term of his contract shall be completed," a justice may commit him to the house of correction for a certain period; and it was held, that the words "other persons" meant persons of the same

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description as those before enumerated, and consequently that the statute did not apply to a domestic servant: *Kitchin v. Shaw* (a). By the 3 Car. 1, c. 1, "no carrier with any horse, nor waggon-man with any waggon, nor carman with any cart, nor wainman with any wain, nor drover with any cattle, shall by themselves, or any other, travel on the Lord's day;" and by the 29 Car. 2, c. 7, "no tradesman, artificer, workman, labourer, or other person or persons shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day:" and it was held, that the words "other person or persons" did not include the owner and driver of a stagecoach: *Sandiman v. Breach* (b). So, where an Act for cleansing, lighting, and watching the streets of a township empowered the commissioners to rate the tenants and occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brew-houses, and other buildings, gardens or garden ground, and other tenements in the township, it was held that the trunks and pipes, works, and other apparatus of a water company, for the supply of the township with water, did not constitute a "tenement" within the meaning of the Act: *Ree v. The Manchester and Salford Waterworks Company* (c). [Parke, B., referred to *Reed v. Ingham* (d).] Here the covenant enumerates certain articles, which are landlord's fixtures, and then adds "and all other fixtures and articles in the nature of fixtures." According, therefore, to the established rule of construction, those words mean other fixtures of the same description as those previously enumerated [Martin, B.—The covenant mentions marble chimney pieces, but they are removeable by a tenant: *Landon v. Salmon* (e). Parke, B.—Keys are not fixtures; they are parcel of the freehold: *Liford's case* (f). If nothing had

(a) 6 A. & E. 729.

(b) 7 B. & C. 96.

(c) 1 B. & C. 630.

(d) 3 E. & B. 889.

(e) 1 H. Bla. 260.

(f) 11 Rep. 50 a.

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been said about fixtures, the tenant would clearly have had a right to remove the tenant's fixtures; then why introduce a covenant of this kind, unless it was meant to restrict the tenant's legal right? In covenants of this description, many articles are usually mentioned, which a tenant could not remove. In the precedent of a lease given in Coote's *Landlord and Tenant* (a), the covenant is to deliver up the messuage, "together with all and every the doors, locks, keys, bolts, bars, chimney pieces, dressers, shelves, water pipes," &c. [*Martin*, B.—The rule of law as to what things are fixtures was laid down in *Hellawell v. Eastwood* (b).] In *Martyr v. Bradley* (c), the covenant was to leave a water-mill, with all fixtures, fastenings, and improvements, and that was held to include a pair of new mill-stones set up by the lessee during the term. Again, in *Naylor v. Collinge* (d), a covenant to yield up all buildings which should be erected during the term upon the demised premises, was held to include buildings erected by the tenant for the purpose of trade, if fixed to the freehold. So, if, in this case, the words had been "all fixtures," the point would have been free from doubt; but, a particular class having been specified, the words "other fixtures" have reference to that class. Unless the covenant be so construed, it would include a chandelier or a steam-engine erected for the purposes of trade.

Maude for the defendant.—The question is not whether this is a reasonable or a convenient covenant, but what is the meaning of the parties. Their intention was to qualify the rights which the tenant would have had if the covenant had not been inserted. In order to prevent disputes, the tenant is to leave upon the premises all fixtures. The other side would read the covenant as if it contained the words "usu-

(a) App. "Leases," No. 1.
 (b) 6 Exch. 295.

(c) 9 Bing. 24.
 (d) 1 Taunt. 19.

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ally called landlord's fixtures." The general words are now qualified by the particular ones. The rule of construction referred to is only applicable where the language is ambiguous. Supposing the parties intended to include the three descriptions of fixtures, could they have expressed themselves in more distinct terms, the words "other fixtures" being followed by the words "and articles in the nature of fixtures?" The general principle is thus stated in Amos on Fixtures, p. 116: "All the authorities, therefore, concur in establishing, that, notwithstanding the property in question may have belonged to the tenant, and whether it is permanently fixed to the freehold or not it may still become irremovable, if, by the interpretation of the contract between himself and his landlord, it appears to have been contemplated by them that it should not be taken away at the expiration of the term." In *Naylor v. Collinge* (a), the language of the covenant was not more general than in the present case. *Rex v. Topping* (b), shews that a tenant's right to remove machinery erected by him for the purposes of his trade, may be varied by agreement with his landlord. In *Penry v. Brown* (c), Abbott, J., ruled that a covenant to yield up all erections, buildings, and improvements, extended to a veranda erected during the term. Under a similar covenant as to erections and improvements, it has been held that a lessee could not remove a greenhouse, the framework of which was laid upon walls built for the purpose of receiving it, and embedded in mortar thereon: *West v. Blakeway* (d). In *The Earl of Mansfield v. Blackburne* (e), a lease was granted of certain salt works, messuages, &c., and the lessee covenanted to leave the premises and works in good repair at the end of the term; and it was held that iron salt pans, placed by the lessee on a frame of brick, and used in the boiling of salt, were parcel

(a) 1 Taunt. 19.

(b) 2 M'Cl. & Y. 545.

(c) 2 Stark. 403.

(d) 2 M. & G. 729.

(e) 6 Bing. N. C. 426.

of such works and could not be removed. [*Parke, B.*—There could be no doubt in that case.] *Wiltshire v. Cottrell* (a), shews, that, in a conveyance, a chattel, not a fixture in the ordinary sense of the word, may pass under that term, if an intention to pass it can be collected from the context. [*Parke, B.*—By a sale and conveyance of a house, if nothing is said about fixtures, all fixtures pass: *Colegrave v. Dias Santos* (b).] In *Regina v. York* (c), it was held, that a lease was a contract within the 5 & 6 Will. 4, c. 76, s. 28, the words of that statute being “contract or employment.” So here the words of the covenant ought to receive their ordinary legal acceptation.

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Cur. adv. vult.

The learned Judges, having differed in opinion, now delivered their judgments seriatim.

MARTIN, B.—This is a case stated by the parties, without any pleadings, for the judgment of the Court, under the Common Law Procedure Act, 1852.

By indenture of lease dated the 10th of May, 1853, the Marquis of Camden and another demised to the plaintiff a piece of land therein particularly described, together with a brick messuage then erected and covered in upon it, called “The City of London,” for the term of ninety-seven years and a half from the 25th of March, 1853, at a certain rent. The indenture contained the following covenant:—“That the plaintiff, at the expiration or sooner determination of the said term, should and would peaceably surrender and deliver up the said demised premises unto the said Marquis Camden, &c., together with all locks, keys, bars, bolts, marble and other chimney pieces, foot-paces, slabs, and other fixtures, and articles in the nature of fixtures, which shall at any time during the said term

(a) 1 E. & B. 674.

(b) 2 B. & C. 76.

(c) 2 Q. B. 847.

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be fixed or fastened to the said demised premises, or be thereto belonging."

The plaintiff entered and took possession under the lease, and fitted up the house for the purposes of the business of a tavern-keeper and licensed victualler, and put in and fixed to the premises certain fixtures of the description *and called and known as trade fixtures and tenant's fixtures*, and which are set forth and enumerated in a schedule annexed to the case; and it is agreed between the parties, and it is to be taken as admitted, that all the fixtures would be removeable by the tenant, as against the landlord, as trade fixtures or tenant's fixtures, unless the covenant above set forth, or the covenant hereinafter mentioned, precludes such removal.

In December, 1853, the defendant contracted with the plaintiff to purchase from him an underlease of the premises, with an agreement that the defendant should purchase the furniture, fixtures, stock in trade, &c., at a valuation. In pursuance of this contract, an underlease was executed by the plaintiff, which contains a covenant on the part of the defendant in the same words as those in the covenant before set forth. The defendant entered into and

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If the Court should be of opinion, that the defendant would have a good title to both descriptions of fixtures, judgment is to be entered for the plaintiff for the entire sum of 57*l.* 16*s.*; but if the opinion of the Court be, that he only would have a good title to one of the descriptions, the judgment is to be entered for the plaintiff for the agreed value of such description; and if the opinion of the Court be, that he would not have a good title to either description, then the judgment was to be entered for him.

The case has been argued before us, and the line of argument urged on behalf of the plaintiff was, that there were three descriptions of fixtures well known and contemplated by conveyancers, and designated as landlord's fixtures, tenant's fixtures, and trade fixtures; *that all the articles mentioned in the lease and underlease were of the character of landlord's fixtures*; and that, upon the principle of construction laid down in *Sandiman v. Breach* (a) and *Kitchen v. Shaw* (b), viz., that, where general words follow particular ones, the rule is to construe them as applicable to things and persons ejusdem generis, landlord's fixtures should alone be considered as the subject-matter of the covenant, and it should be construed not to extend either to tenant's fixtures or trade fixtures.

The word "fixture" is a modern word. It is stated to be so by Baron Parke in *Sheen v. Rickie* (c), and by Lord Campbell in *Wiltshire v. Cotterill* (d), where his Lordship observed, that it is not to be found in the *Terms de la Ley*. The old rule laid down in the old books is, that, if the tenant or the occupier of a house or land annex anything to the freehold, neither he or his representatives can afterwards take it away, the maxim being "*quicquid plantetur solo, solo cedit*:" *Minshall v. Lloyd* (e). But as

(a) 7 B. & C. 96.

(d) 1 E. & B. 674.

(b) 6 A. & E. 729.

(e) 2 M. & W. 450.

(c) 5 M. & W. 175.

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society progressed, and tenants for lives or for terms of year of houses, for the more convenient or luxurious occupation of them, or for the purposes of trade, affixed valuable and expensive articles to the freehold, the injustice of denying the tenant the right to remove them at his pleasure, and deeming such things practically forfeited to the owner of the fee simple by the mere act of annexation, became apparent to all; and there long ago sprung up a right, sanctioned and supported both by the Courts of Law and Equity, in the temporary owner or occupier of real property or his representative, to disannex and remove certain articles, although annexed by him to the freehold, and these articles have been denominated "fixtures;" and the best definition with which I am acquainted is that given in the judgment of this Court in *Hallen v Runder* (a), viz that they are articles which were originally personal chattels, and which, although they have been annexed to the freehold by a temporary occupier, are nevertheless removeable, and of course saleable, at the will of the person who has annexed them. The term, however, does not include everything which is fixed, and so rendered immovable. The object and purpose of the annexation in fixing must be looked at; and if a chattel be fixed to the building merely for the more complete enjoyment and user of it as a chattel, it is not a fixture at all in the technical legal meaning of the word, but still remains a chattel. Upon this principle, it was decided, in the case of *Hellawell v. Eastwood* (b), that cotton spinning-machines, screwed into and fixed firmly to the floor, were chattels and distrainable for rent.

From the above explanation of the term "fixtures" it is obvious that the expression "landlord's fixtures" is a most inaccurate one. All the materials of a house are, before they are fixed, chattels. The bricks, the mortar, the timber, the

(a) 1 C. M. & R. 266.

(b) 6 Exch. 296.

all the other materials of a house were originally personal chattels; and there can be no doubt, that, if the landlord builds the house, and puts in for the purpose of completing the house, for instance, chimney-pieces, stoves, bells, &c., which are in the house when let to the tenant, they all remain the property of the landlord, part of the house, and are only to be enjoyed by the tenant during the term, and are not removeable by him any more than the walls or roofing or flooring. It is therefore, inaccurate to apply the term fixtures to that which belongs to the landlord; but probably what is meant by the term "landlord's fixtures" are such articles which, once annexed by the tenant, cannot be disannexed by him; and it is in this sense I understand the term to have been used by the learned counsel for the tenant.

There is no doubt, as was stated by him in his opinion, that where there is a covenant in the lease in respect of the fixtures, the right of the parties in respect of the fixtures must be regulated by the covenant; and his contention, that, upon the true construction of the covenants in the present case, the tenant would be entitled to remove the fixtures, which, by the general rule of law as between landlord and tenant independent of all contract or covenant, the tenant would have a right to remove.

In my opinion, the argument of the learned counsel fails in so far as it relates to the descriptions of fixtures in question, viz. the fixtures. The rule of construction referred to by the learned counsel is a good and sound one, but his argument fails in fact, for all the articles mentioned in the covenants are landlord's fixtures in the sense in which that expression is used by him. If all these articles were such as, once annexed, were irremoveable by the tenant, there would be some colour for his argument, but they are not. The first articles mentioned are locks and keys. These are not fixtures at all. The lock is part of the house as is the door to which it is annexed. The key is of

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itself a moveable chattel, but belongs to the house as part of the lock, and would pass by a conveyance of the house: *Liford's case* (a); but marble chimney pieces are articles mentioned in the covenants, and they are "tenant's fixtures" properly so called, and but for the covenant would be clearly removeable by the tenant: *Lawton v. Salmon* (b). There can be no doubt whatever that if the tenant, under the present lease, erected marble chimney pieces of the most ornamental and expensive character, the operation of the covenant would be, that he could not remove them during the term, and he would be obliged to leave them on the premises at its expiration. The argument of the learned counsel, therefore, fails in point of fact; and in my opinion, under such covenants as the present, where a tenant covenants to deliver up "marble and other chimney pieces, and all other fixtures and articles in the nature of fixtures, which shall at any time during the term be fixed or fastened to the premises;" he must leave all fixtures which are annexed for the occupation and enjoyment of the house as a house; for instance, grates or stoves built in the usual way, bells, the wires of which are inserted in the walls, presses fixed for the more convenient use of the individuals inhabiting the house, whoever they may be; in short, all fixtures which render the house more convenient and habitable as a house; and, assuming that the articles denominated tenant's fixtures in this case are of this character, (which I have no doubt they are), in my opinion the tenant under the lease would have no title to or right to sell or remove them, but that they would belong to the landlord, and the tenant removing them would be liable to an action at the suit of the Marquis of Camden; and that, therefore, as to the value of these articles, the defendant is entitled to our judgment.

As to the other description of fixtures, I think the plaintiff is entitled to recover their value. I assume them to be

(a) 11 Rep. 50 a.

(b) 1 H. Bla. 259.

fixtures put up exclusively for the carrying on of the trade, or for ornamenting and beautifying the house as a public house. In my opinion such fixtures are entirely out of the covenants, and the rights of the parties in respect of them are regulated by the general law. In the absence of contract, trade fixtures are clearly removeable by the tenant, and he by sale may give a good title to the purchaser.

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It was stated, and pressed upon us as a ground for our decision, that conveyancers considered, that, under such covenants as the present, all fixtures usually called tenant's fixtures were removeable; but, in the absence of authority on the construction of any particular covenant, I think our judgment ought to be founded upon the application of the known legal rules and principles for construction, and nothing else; the adopting of any other course would lead to uncertainty, and be attended with mischievous consequences.

PLATT, B.—By indenture of lease, dated the 18th of February, 1853, between the Marquis of Camden of the first part, the Rev. Thomas Randolph of the second part, and the plaintiff, who was a builder, of the third part, the Marquis of Camden demised to the plaintiff and his assigns a piece of ground, together with a brick messuage then erected and covered in upon the ground, or on some part hereof, and described as "The City of London," and all buildings then subsisting or thereafter to be erected upon the same ground, or upon some part thereof: to hold for the period of ninety-seven years and a half, from the 25th of March, 1853.

By that indenture the plaintiff covenanted with the Marquis, that he would, at the expiration of the term, peaceably surrender the said demised premises unto the Marquis Camden, his executors or assigns, together with all locks, keys, bars, bolts, marble and other chimney pieces, foot-pieces, slabs, and other fixtures, and articles in the nature

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of fixtures, which should at any time during the said term be fixed or fastened to the said demised premises, or to thereto belonging.

The general rule of law prohibited the tenant from moving any chattel which he had annexed to the house or land demised to him. He *was deemed* to have made it, by such annexation, a part of the freehold and inheritance, according to the maxim "*Quicquid plantatur solo, solo cedit.*" In mitigation of the rigour of this rule, exceptions in favour of trade, and in favour of the enjoyment of the occupation, have been introduced. In these exceptions have originated the threefold classification of landlord's fixtures, trade fixtures, and tenant's fixtures. The first of these classes, except for the purposes of the arrangement of the subject of the respective rights of particular landlords and tenants, is, perhaps, incorrectly denominated, as whatever is annexed to the freehold and belongs to the landlord is in truth, legally speaking, part of the freehold itself. But when chattels, which, although annexed to the freehold by the tenant, the law does not allow him to remove, and chattels which a tenant usually annexes during the term and would have a right to sever, but which, in fact,

fixed chattel belongs to the landlord or the tenant must, in some instances, depend on what the contracting parties propose to be the subject of the demise. This appears to me to be one of those instances.

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In the case now before the Court, the question is, what, according to the true construction of the contract, do the words "and other fixtures and articles in the nature of fixtures, which shall at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging," include? The plaintiff contends that they do not include more than are usually denominated landlord's fixtures. The defendant contends that they include all fixtures, extending therefore not only to the tenant's fixtures as distinguished from landlord's fixtures and trade fixtures, but to trade fixtures also. The lease was a building lease granted to a builder, and, according to the ordinary practice, granted after the house had been covered in. He was to build and complete the house which the landlord was to demise to him. His object was, to acquire a profitable use of the land, and that of the landlord was, at all events, to secure during the term the rent reserved, and the existence, not only during but at the end of the ninety-seven years and a half, of a messuage constructed on the land according to the dimensions of the building which had been covered in, and with the materials ordinarily adopted in the completion of such a messuage, and in accordance with the modern state of domestic architecture. Does the language of the covenant in question exact more? It cannot fairly be doubted that the contracting parties (whatever the technical inaccuracy may be) treated the things specified in the covenant as fixtures or articles in the nature of fixtures, viewing probably locks, some of the bars, the marble and other chimney pieces, foot-paces, and slabs fixed or fastened to the demised premises as fixtures, and the keys and other of the bars as articles in the nature of fixtures, and belonging to the premises. A lessor executing, when

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the house was but covered in, a lease (not only of the ground, but of the house and all other buildings then subsisting or thereafter to be erected), might naturally exact such a covenant, in order to secure to the reversioner the surrender of a perfect messuage and perfect buildings.

In the precedent of a lease to be granted in similar circumstances, which is to be found in the 357th page of *Mills' Practice of Conveyancing*, published in 1745, I find a similar covenant, by which the builder engaged to surrender at the end of the term unto the lessor, or his assigns, the demised premises, well and sufficiently repaired, together with all wainscot, window shutters, hearths, slabs, chimney pieces, and other things thereto affixed and belonging.

The foot-paces clearly belong to the landlord. Johnson and Chambers, in their Dictionaries, distinctly describe them as the landing places at the tops of or between flights of stairs. Slabs, probably, are meant to describe flat pieces of stone or wood laid in the ground immediately inside or outside any of the outer doors. If so, they would belong to the landlord. Locks, keys, and bars belong to the landlord; so would a loose shutter, which, for security of the house, was required to be put up every night and fastened by a pin.

In *Poole's case* (a), the only reported case bearing on this subject, in which chimney pieces were the subject of controversy, Lord *Holt* distinctly ruled, that the sheriff, under a *fiery facias* against the goods of the tenant, could

apply that rule in the decision of either of those two cases. The first related to a fire engine erected for the benefit of a millery; and the second, to the utensils of a brewery, which had been claimed by a mortgagee of the brewhouse and its appurtenances.

In *Lawton, Executor, v. Salmon (a)*, which was a controversy between the executor and the heir of the testator, the salt pans laid down by the testator were part of personal estate, Lord *Mansfield*, in adverting to the relation of the general rule in favour of the tenant, is reported to have said, that erections for carrying on any trade, marble chimney pieces, and the like, when put up by the tenant, might be taken away; and to have added, that "this is no injury to the landlord, for that the tenant leaves the premises in the state in which he found them, and the tenant benefited."

In *Elwes v. Maw (b)*, Lord *Ellenborough*, in giving the judgment of the Court of King's Bench, quotes Lord *Holt's* distinction between the utensils of the tenant's trade and hearths and chimney pieces in his house, and then proceeds thus—"The indulgence in favour of the tenant for the term during the term has been since carried still further, and he has been allowed to carry away matters of ornament, as ornamental marble chimney pieces, pier glasses, rings, wainscot fixed only by screws, and the like." The introduction of the word *ornamental* tends to shew that the Court of King's Bench did not understand the objection of Lord *Hardwicke* and Lord *Mansfield*, in the cases I have quoted, to apply to marble chimney pieces generally, but to ornamental marble chimney pieces only. In *Buckland v. Butterfield (c)*, in which the Court of Common Pleas, in delivering their judgment that a conservatory built on the demised land could not be removed, appeared to take that view, when they say, "the relaxation has

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(a) 1 H. Bl. 259, n. (b) 3 East, 38. (c) 2 Brod. & Bing. 58.

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been in favour of matters of ornament, such as ornamented chimney pieces, pier glasses, hangings, wainscot fixed with screws, and the like." Both the expressions taken together concur to establish that the ornamental character of the chimney piece put up by the tenant, and not the material of which it may be formed, confers the privilege of removal.

It seems to me, that the privilege is not derived from any other source; consequently, that no one of the things specified in the covenant would be necessarily removeable as a tenant's fixture. It should also be observed, that the messuage, which was to be parcel of the subject demised, was to be completed by the lessee, and, when completed, was to belong to the landlord, subject to the holding of the lessee and his assigns during the term; and that it does not appear that he was not bound by his building contract to place in some of the apartments marble chimney pieces. If he was bound to do so, they, on being fixed, would become part of the house, which under the lease he took of the lessor, and the reason assigned by Lord Holt in *Pool's case* for his decision would apply, and that assigned by Lord Mansfield in *Lawton v. Salmon* for the right of removal would be wholly inapplicable.

If tenant's fixtures were to be given up at the end of the term, one would have expected some one of them to have been nominated. If such had been the intention of the parties, would not, from amongst the numerous heads of tenant's fixtures, grates, ranges, ovens, stoves, jacks, copper, bells, gas fittings, blinds, fixed tables, water tubs, cupboards, &c., the covenantee have required the specific introduction of one or more of them into the covenant. Taking for granted that the defendant's covenant to repair corresponds, as it ought to do, with the plaintiff's covenant to repair in the lease to the plaintiff, and finding that the Marquis Camden demised the grounds and buildings only, that the lease does not contain any engagement on the part of the plaintiff to preserve or keep in repair dur-

ing the term *any fixtures*, and that the covenant to surrender does not specify any subject which the reversioner would not be entitled to as part of or belonging to the demised premises, I am of opinion that the words "other fixtures which shall be fixed or fastened to the said demised premises, and the articles in the nature of fixtures, which shall be to the demised premises belonging," must be restricted to fixtures and articles of the same kind as those previously specified, and that they do not include any tenant's fixtures whatever.

Wherefore, I think the plaintiff is entitled to the judgment of the Court for the whole sum of 573*l.* 16*s.*

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PARKE, B.—The question in this case for the opinion of the Court is stated to be, whether, under the circumstances mentioned in the special case, the plaintiff had any right or title to sell the fixtures described in it as tenant's or trade fixtures respectively; and whether the defendant, upon paying for the same, will have a good title to them, and will be entitled, during the continuance of the underlease, or at its expiration, to detach or remove either set of fixtures from the demised premises as his property, without being guilty of a breach of covenant in the underlease.

This question depends entirely upon the construction of the covenant in the underlease from the plaintiff to the defendant, which, according to the contract between the plaintiff and the defendant, was to contain, and did contain, all and every the like or similar covenants, as were expressed and contained on the lessee's part, in the original lease of the plaintiff, or as near thereto as circumstances would admit.

The material covenant on which the case depends is this:—*His Lordship read the covenant in the underlease (a).]* Both descriptions of fixtures, which are the subject of this in-

(a) Ante, p. 500.

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quiry, usually called, when fixed by the tenant, tenant fixtures and trade fixtures, would clearly be removeable by the tenant during the term. The question then is, whether the effect of this covenant is to prevent the removal of either one or both. I am of opinion, that it prevents the removal of both; but I feel satisfied, that it prevents that of tenant fixtures, but have had some little doubt as to trade fixtures.

The covenant is express, "to surrender and deliver up the demised premises, with all locks, keys, bars, bolts, marble or other chimney pieces, foot-pieces, slabs, and other fixtures and articles in the nature of fixtures, which shall at any time during the term be fixed or fastened thereto, or be thereto belonging." These words are very general, but they cannot be construed strictly, so as to require the identical locks and keys originally belonging to the house, or the identical fixtures originally attached to the building, to be delivered up at the end of the term, otherwise it would prevent the tenant from having an improved lock and key, or from altering a chimney piece or slab, but they would certainly prevent the tenant from removing the substituted locks, keys, and chimney pieces or slabs at-

personal chattels annexed to the freehold, but which are removeable at the will of the tenant: *Hallen v. Runder* (a); and the words of the covenant are very general, and extend not only to *all* fixtures, but articles in the nature of fixtures.

But, then, the plaintiff contends, that the rule of construction, "*noscitur a sociis*" ought to be applied, and that, so applying it, the particular words of the context shew that the fixtures, &c. meant by the covenant were *landlord's* fixtures, and not removeable tenant's fixtures. I do not dispute that such a rule of construction ought to be applied; but I say that it will not in this case produce any limitation of the general words. The term "*landlord's fixtures*" means such things as the landlord chooses to annex to the freehold and to demise with it, and which, of course, the tenant has no right to remove, and must restore at the end of the term; and the argument, therefore, is in effect this, that the covenant was only to secure the landlord's right, at the end of the term, to have his house with the fixtures which he annexed to it restored to him. It, therefore, abridged no right of the tenant to remove, but only was a security for his own. But, in the first place, in this particular case, there really were no landlord's fixtures in point of fact. All the fixtures referred to in this covenant may be inferred to be such as had been fixed, or were *to be fixed*, by the tenant himself; and were not already fixed by the landlord. The house, by the original lease, was demised as an unfinished house, and the original covenant by the plaintiff, and the covenant by the defendant in the same terms, both contemplate that the house was to be finished and fitted up by the tenant, and it is expressly stated that it was so fitted up as a public house.

But then it may be said, that the covenant ought to be construed by the context to extend only to such fixtures as were *usually termed* landlord's fixtures, and as *ordinarily*,

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(a) 1 C. M. & R. 276.

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though not in this particular case, were attached by the landlord himself, or if attached by the tenant could not be removed by him. Now, in this case, though locks, keys, bars, and bolts are either in fact, or constructively, parcel of the freehold, and are usually provided by the landlord, and belong to him, and may be *usually* termed landlord's fixtures, and if fixed by the tenant probably could not be removed by him; yet marble chimney pieces are articles, which, being of an ornamental nature, are usually considered when fixed to the freehold by the tenant removeable as *tenant's* fixtures, and have been stated so to be by Lord *Hardwicke*, (*Lawton v. Lawton*(a), and *Ex parte Quincy*(b)), and by Lord *Mansfield* in *Lawton v. Lawton*(c); so that the special instances given in the context, are not all such as are usually called landlord's fixtures, and therefore the other fixtures and articles in the nature of fixtures cannot be limited to what are usually termed landlord's fixtures, but ought to have their full effect. When, therefore, the tenant covenants to deliver up the house with all fixtures attached to it by himself, he is bound to deliver up *all*; and the specifying particular fixtures, some of which are, and some are not removeable in general by the tenant, cannot make the least

nant. The covenant would not oblige the defendant to leave a turning lathe or spinning machine, if he chose to use one, on the demised premises, which was merely fixed for the purpose of using it more conveniently as a machine. None of the articles mentioned in the schedule appear to fall within the description of such chattels, but they are all fixed for the better enjoyment of the house as a public house. Nor does this seem to be a question left to us for our decision. We are only to decide whether all fixtures which are fixed to the house for the better use of it, though in the absence of a covenant removeable by the tenant, are by this particular covenant prevented from being so.

It is further to be observed, that the house may be reasonably inferred from the original lease to have been intended to be used as a public house, and the covenant in the underlease is to be construed with reference to it. The underlease was taken for the purpose of its being so used. There is, therefore, no reason why the general term "fixtures and articles in the nature of fixtures" should not extend to those things which are made part of the dwelling-house, for the sake of carrying on a particular species of trade in it. I think they ought to be so construed. The only doubt I have felt is, that, by the terms of the covenant so construed, an obligation would be created to continue the house *as a public house* for the whole term of ninety-seven years, as none of the trade fixtures, when once attached, could be removed, except as above suggested for the sake of substituting others. That differs this case from that of a mere dwelling-house, and the fixtures, which both parties unquestionably mean in an ordinary occupation lease to continue for the whole term. In this case, however, both parties may be presumed to have intended the trade to be carried on for the whole term, which I infer from the purchase of the goodwill and the price given for it, and the purchase of the stock in trade and trade fixtures; and I therefore think there is nothing unreasonable in putting the natural construction on the words "all fixtures, and all things in

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the nature of fixtures." I think the judgment should be for the defendant, on the ground that the plaintiff had no right to sell either one description of fixtures or the other.

Judgment for the plaintiff for 501*l.*, the value of the trade fixtures.

Where, after writ issued, a special case is stated without pleadings, under "The Common Law Procedure Act, 1852," and there is no agreement as to costs, a plaintiff who has judgment for part of his claim is entitled to the general costs of the cause, and the defendant is entitled to deduct any costs which he may have incurred in re-

Bovill, in the following Term, moved for the judgment of the Court as to the costs of the action. The 47th section of "The Common Law Procedure Act, 1852," enables the parties to enter into an agreement as to costs. Then, by the 48th section, "In case no agreement shall be entered into as to the costs of such action, the costs shall follow the event, and be recovered by the successful party." In this case, the event is in favour of the plaintiff. [*Parke, B.*—It is as if the plaintiff had sued in trover for tenant's fixtures and trade fixtures, and quoad the trade fixtures had succeeded, but as to the tenant's fixtures had failed. Then the plaintiff is entitled to the general costs of the cause, and the defendant is entitled to set-off the costs of the part found for him, which are in truth nothing.]

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Nov. 25.

THE declaration alleged that the plaintiffs lent to Sir Thomas Brancker, deceased, the sum of 10,000*l.*, upon the security of certain shares in public companies, on the terms, that if during the continuance of the loan the market value of the said shares or any of them, according to the lowest price quoted in the list published under the authority of the Liverpool Stock Exchange, should not be 10 per cent. above the money owing on the said security, the said Sir T. Brancker would, within three days upon being required, either furnish additional securities, to the satisfaction of the plaintiffs, or, at the option of the plaintiffs, repay so much of the principal money owing as should always maintain the value of the said securities at 10 per cent. above the money owing; and that, if the said Sir T. Brancker should make default in payment of all monies and interest due on the 26th of April, 1848, or if in the meantime he should commit any breach, or fail in performance of any of the terms of the said agreement, the plaintiffs should be at liberty to sell the said shares, and repay themselves the principal and interest due.—The declaration then averred, that the defendant and certain

The rule which prevails in assurances upon ships and lives, that all material circumstances known to the assured must be disclosed, though there be no fraud in the concealment, does not extend to the case of guaranties. In the latter case, the concealment, to vitiate the guarantee, must be fraudulent.

A. obtained a loan of 10,000*l.* from the plaintiffs, an insurance company, on the deposit of certain railway shares, with a stipulation, that, if the market value of the shares fell below

a certain amount, A. should either furnish fresh shares or pay their value, so as to leave a given surplus. When the time for repayment of the loan arrived, the shares having fallen in value, the time was extended to a further period on the deposit of additional shares and the acceptance of A.'s brother (B.) to the amount of 2000*l.* Before the loan became due in pursuance of the terms of this second arrangement, B. applied to the plaintiffs to be released from his acceptance, upon procuring the guarantee of the defendant and three others for 500*l.* each. The plaintiffs assented to this arrangement. A. then informed the defendant of the loan and of its terms, and told him, that, unless he could procure security, his shares would be sold at a great loss; but the arrangement as to the withdrawal of B.'s acceptance was not communicated to the defendant, and he was wholly ignorant of it. The defendant executed a guarantee, which did not refer to B.'s acceptance for 2000*l.*, but recited the consideration for the guarantee to be the original loan, and of the plaintiffs' agreeing not to require any further security in the event of the depreciation of the shares as provided for by the original agreement. In an action on this guarantee—*Held*, that the non-communication of the private arrangement between the plaintiffs and A. and his brother did not amount to constructive fraud, and afforded no defence to the action.

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other persons afterwards made and submitted the
 ing agreement and undertaking with the plaintiffs in
 ence to the said advance (that is to say): " In con-
 tion of an advance of 10,000*l.* made by the said
 British Insurance Company to Sir T. Brancker, up
 securities of certain shares specified in an agreeme
 tween the said parties, bearing date the 8th of Nov
 1847, and of the said company agreeing not to requi
 further security, in consequence of the depreciation
 said shares, as provided in the said agreement, v
 undersigned do hereby undertake and agree to gua
 the said North British Insurance Company from a
 or damage which they may sustain, in case, upon
 of the said shares, the net proceeds thereof shall pr
 sufficient for the payment of the said loan of 1
 with interest thereon; provided, that our liability
 this guarantee shall not exceed the amount placed o
 to our respective signatures; and also, that any los
 may be sustained shall be paid by us only in rata
 portion to the amount guaranteed by each party;
 further agree, that the right of the North British In
 Company to recover upon this guarantee shall not

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was agreed between all the parties to the transaction aforesaid, that the plaintiffs, instead of selling the said shares so retained by them as aforesaid, should themselves take to and have the said shares as their own at the then highest market price thereof, to wit, at the sum of 5022*l.* 3*s.* 9*d.*— The declaration then further alleged, that there still remained due to the plaintiffs in respect of the said advance, and within the meaning of the said undertaking and guarantee of the defendant, a sum far exceeding the sum of 2000*l.* guaranteed by the said undertaking, to wit, the sum of 5490*l.* 1*s.* 10*d.*; and averred, that the defendant, although requested, had not paid his proportion or sum of 2000*l.*

The defendant pleaded, first, a denial of any such agreement between the plaintiffs and Sir T. Brancker as the agreement mentioned and referred to in the agreement and undertaking subscribed by the defendant; and, thirdly, that he was induced to make and subscribe the said agreement by the fraud, covin, and misrepresentation of the plaintiffs and of others in collusion with them. The plaintiffs took issue on these pleas.

At the trial, before *Crowder, J.*, at the last Liverpool Assizes, it appeared that, in the year 1846, Sir Thomas Brancker had obtained from the plaintiffs a loan of 10,000*l.* for twelve months, upon the deposit of certain railway shares, and subject to the condition that if the shares should fall 20*l.* per cent. below the then market value, Sir T. Brancker should either furnish new shares or pay their value, so as to leave a surplus of 20*l.* per cent. At the end of the year, the value of the shares having fallen considerably, an agreement was come to, by which the loan was renewed for the further period of six months, upon an additional deposit of shares being made, and a further deposit with the plaintiffs of a bill of exchange for 2000*l.* for six months, drawn by Sir T. Brancker upon, and accepted by, his brother James Brancker. In January, 1848, James

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Brancker wrote to the plaintiffs' manager, proposing that a guarantee, to be given by the defendant and three other persons in the amount of 500*l.* each, should be taken by the plaintiffs in substitution of his acceptance for 2000*l.* Sir T. Brancker applied to the defendant to execute the guarantee, stating that the shares which he had deposited with the plaintiffs would be sold at a great sacrifice unless he could obtain such additional security. The defendant accordingly executed the guarantee stated in the declaration. This guarantee had been prepared by the plaintiffs' solicitor, from a draft made by James Brancker; but neither the fact of the existence of James Brancker's acceptance nor the withdrawal of it were communicated to the defendant, nor had he any knowledge thereof. The defendant, who appeared as a witness, stated that if he had known the facts which had not been communicated, he would not have executed the guarantee; but he admitted, on cross-examination, that he relied on the solvency of Sir T. Brancker. Under these circumstances, it was submitted, on the part of the defendant, that the non-communication to the defendant of the facts with regard to the acceptance of James Brancker and its withdrawal amounted to

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He ought to have been informed of the fact that the security given by him was taken by the plaintiffs in substitution of the acceptance of James Brancker, and not solely on the terms stated in the guarantee itself. By the non-communication or concealment of this most material circumstance, the position of the defendant was altered. If he had known all the circumstances, he would have had an opportunity of making further inquiries, which might have led to his refusing to become surety. It is a general rule of law, that a party about to become surety is entitled to know every circumstance connected with his principal's position. [Parke, B.—That rule, no doubt, is applicable to contracts of assurance; but what authority is there for saying that it is extended to cases of suretyship?] In *Pidcock v. Bishop* (a), Abbott, C. J., said: "I am of opinion that a party giving a guarantee ought to be informed of any private bargain made between the vendor and vendee of goods, which may have the effect of varying the degree of his responsibility." Here the true ground upon which the guarantee was required from the defendant was not communicated to him. [Pollock, C. B.—In the case relied upon, a gross fraud was practised upon the party from whom the security was obtained; for the private bargain between the vendor and vendee was, that the vendee should pay more than the market price of the goods, and that such excess should go to wipe off an old debt due from the vendee to the vendor. Alderson, B.—The surety there was given to understand that the parties were trading together, implying, as a matter of course, that they were trading on the usual terms.] Here the private bargain between the plaintiffs and the debtor was, that the security of a third party should be given up. [Parke, B.—If a fact ought to be mentioned by the creditor to the surety, the omission to communicate it may amount to a fraud.] In *Railton v.*

(a) 3 B. & C. 605.

...tional, or with a view to any advantage to himself.

B.—*Hamilton v. Watson* (b) lays down a contrary rule. There, Lord Campbell, C. J., said: "Your Lordships particularly notice what the nature of the contract is suretyship upon a cash account. Now, the question is, what, upon entering into such a contract, ought to be disclosed? And I venture to say, that, if your Lordships were to adopt the principles laid down and contended for by the appellant's counsel here, that you would entitle them to set up those transactions in Scotland of giving security upon a cash account, because no bankers would rest satisfied that they had a security for the advance they made. If it is contended, it is essentially necessary that every banker should be disclosed by the creditor that is material for the surety to know. If such was the rule, it would be essentially necessary for the bankers to whom the security was to be given to state how the account has been conducted, whether the debtor was in the habit of over-drawing, whether he was punctual in his dealings; whether he had performed his promises in an honourable manner: these things are extremely material for the surety to know. But unless questions be particularly put by the creditor to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure; and I should think that it might be considered as the criterion whether the d

tion, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires." Now, I deny that it is established that the rule which obtains in policies of assurance is applicable to cases of suretyship. The creditor in such case is not bound to disclose every fact that might influence the surety. The concealment, to avoid the contract of suretyship, must amount to actual fraud. Here, for aught that appears, the undisclosed arrangement between the plaintiffs and the other parties may have been a perfectly fair one. If we were to lay down, that the rule contended for is applicable to suretyship, scarcely any guarantee would stand. *Alderson, B.*—If a representation had been made to the defendant which the plaintiffs had at the time known to be false, and yet had allowed it in silence, that might have amounted to fraud. If mere non-communication had the effect contended for, all guarantees taken by Government for the good behaviour of their officers would be destroyed. *Railton v. Mathews* is one of a class of cases in which the judges are judges both of law and of fact.] *Smith v. The Bank of Scotland* (a) shews, that in circumstances of suretyship bankers are bound to communicate to a surety all material facts within their knowledge relating to the matter of the suretyship. [*Alderson, B.*—That authority goes to this extent only, that a case may exist where a bond of suretyship may be invalidated by the mere non-communication of existing facts, which, if disclosed, would have materially varied the state of facts disclosed.] In

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(a) 1 Dow, 272.

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Owen v. Homan (a), which was an appeal from an order of the Master of the Rolls, this subject is discussed. Lord *Truro*, L. C., in delivering his judgment there, said, "I am not aware that either the text-books or the decisions distinctly define the extent of the obligation and responsibility which rests upon the creditor in regard to the surety being made acquainted with all the material circumstances connected with the transactions to which the suretyship is to be applied. The cases which are reported have generally arisen out of transactions in which there has been personal communication between the creditor and surety; and the clear law deducible from those decisions is, that the creditor must make a full and fair and honest communication of every circumstance calculated to influence the discretion of the surety in entering into the required obligation. Lord *Cranworth*, while sitting as Lord Commissioner, well observed, that applications for special injunctions are very much governed by the same principles which govern insurances, where the assured is bound to give to the underwriter all the information in his power, to enable him to estimate the character of the risk he is invited to undertake. I think the same principle is applicable to

mis-representation or non-communication of material circumstances by the debtor, where there is no communication between the creditor and the surety." [Parke, B.—*Green v. Homan* was carried up to the House of Lords(a); the opinion of Lord-Chancellor *Truro*, expressed in the passage cited, was not acquiesced in by that Court. According to the position contended for, sureties could not be charged without making the substituted sureties acquainted with that fact. This subject has been very ably treated by an American writer(b), in which he states, that the necessity of the disclosure of all material circumstances in cases of insurance is founded upon mercantile usage, and not upon fraud.] The fact of the existence of the acceptance of the debtor's brother was a most material fact, and, as such, ought to have been communicated to the defendant; and the learned Judge should so have directed the jury. The defendant, at the time he entered into the suretyship, trusted the debtor to the extent of 500*l.*; but if he had known the fact which was not disclosed, he would not have done so.

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Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—The plaintiffs in this case had lent 10,000*l.* to Sir T. Brancker on the 26th of August, 1846, payable in a year, on the deposit of some shares, with a stipulation, that, if the market value of the shares should fall 20*l.* per cent. below 10,000*l.*, he should furnish new shares, or pay their value, so as to leave a surplus of 20*l.* per cent. The shares having fallen in value below that amount, the defendant and three others, in consideration of the plaintiffs not requiring a deposit of shares to secure the deficiency, guaranteed the plaintiffs to the amount of

(a) 17 Jur. 861.

(b) Quære, Duer on Insurance.

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the deficiency, each being liable for a certain share—the defendant to the amount of 500*l*.

The action was founded on this guarantee. There was a plea of fraud.

On the trial, before my Brother *Crowder*, the evidence in support of the plea was, that, when the loan was due, a new agreement was made, to forbear to call for the 10,000*l*. for six months more, on having the additional security of Sir Thomas Brancker's brother, James Brancker, for 2000*l*. which was given to the plaintiffs. In January, 1848, James Brancker wrote to the plaintiffs' manager, to inform him they were making arrangements to replace his security by the guarantee on which this action is brought; mentioned the terms of it and the proposed names of the sureties; and the manager received the proposed security as a substitute. The defendant knew nothing of this arrangement with James Brancker. Sir Thomas Brancker called on him and informed him of the loan to him and its terms and told him, that, unless he could procure security, the plaintiffs would sell his shares; and then the defendant and others gave the guarantee (the subject of this action)

he would not have given his guarantee had he been informed of the substitution.

The jury found that the substitution was not a circumstance material to be disclosed, and therefore the question proposed to be reserved did not arise. But, notwithstanding that finding, Mr. *Knowles* still contended that it was material, and that in the case of sureties the non-disclosure of such a circumstance was a constructive fraud.

We are all of opinion that it was not. It seems to us an incorrect proposition, that the same rule prevails in the case of guarantees as in assurances upon ships or lives, in which it is a settled rule that all material circumstances known to the assured are to be disclosed, though there be no fraud in the concealment. This is peculiar to the nature of such contracts, in which in general the assured knows, and the underwriter does not know, the circumstances of the voyage or the state of health.

The cases decided by Lord *Eldon*, and afterwards by Lord *Cottenham*, which were cited by Mr. *Knowles*, as containing the doctrine, that there is an obligation on the part of the person guaranteed to disclose all material matters, proceeded on the ground of actual fraud.

In *Smith v. The Bank of Scotland* (a), decided by Lord *Eldon* and Lord *Redesdale*, they evidently proceeded on the ground of a representation to the surety of trustworthiness in the principal known or believed by the bank to be true; and in *Railton v. Mathews* (b) the point decided by the concurrent opinion of Lord *Campbell* and Lord *Cottenham* was in effect, that it was not necessary, in order to render a concealment by a person fraudulent, that it should be made with a view to the advantage that person was thereby to receive. The Lord Justice Clerk having left that to the jury, as part of a more complex definition of fraud.

(a) 1 Dow, 272.

(b) 10 Cl. & F. 239.

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Again, in *Pidcock v. Bishop* (a), (which was cited *Knowles*), though some expressions were used by Mr. *Bayley* as to the necessity of communicating to the all material facts likely to affect the degree of his re- bility, these expressions must be understood with : to the facts of the case, which was decided on the of actual fraud. But, that the mere relationship of c and surety requires *in all cases* a full disclosure material circumstances was distinctly denied by the in the case of *Hamilton v. Watson* (b), relative to vance by bankers, and particularly by Lord *Campbel* declares, that if the principles contended for, that thing should be disclosed by the creditor that is m for the surety to know, it would knock up transacti giving security on a cash account, because no b would rest satisfied that they had a security for t vance they made. "If such was the rule, it would be pensably necessary for the bankers to whom the sec to be given to state how the account has been kept- ther the debtor was in the habit of overdrawing—w he was punctual in his dealings—whether he perfi his promises in an honourable manner; for all these are extremely material for the surety to know. unless questions be particularly put by the surety t this information, I hold that it is quite unnecessary t creditor to whom the suretyship is to be given to any such disclosure." Lord *Truro*, who, in the c *Owen v. Homan* (c), says, that he thinks the pri which govern assurances are applicable to sureties, it under the impression that neither the text books i cisions defined the nature of the obligation of the c with regard to the circumstances to be disclosed. Lordship apparently was not aware of the decision referred to of *Hamilton v. Watson*.

(a) 3 B. & C. 605. (b) 12 Cl. & F. 109. (c) 3 Mac. & C.

We think the doctrine laid down by Lord *Campbell* perfectly correct and applicable to the guarantee in question. The non-disclosure of the circumstance of the change of security, even if it had been material, would not have vitiated the guarantee, unless it had been fraudulently kept back; and there was no ground to impute fraud in fact to the plaintiffs or their agents. They might well have supposed that the desire of Mr. J. Brancker to get rid of his own guarantee did not indicate any bad opinion of his brother's character or solvency, but arose from a wish on other grounds to contract his liabilities.

The rule must therefore be refused.

Rule refused.

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SULLY and Another v. FREAN.

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THE declaration was on a bill of exchange for 240*l.* drawn by one G. B. Sully upon, and accepted by, the defendant, and indorsed by G. B. Sully to the plaintiffs. The defendant pleaded, first, that the acceptance to the said bill was procured from him by fraud and covin of the plaintiffs and others in collusion with them; and, secondly, "that he accepted the said bill of exchange, and delivered the same to the said G. B. Sully, as the agent of the plaintiffs, and for and on their account, and for their behoof, in part

To a count on a bill of exchange, drawn by G. S. upon and accepted by the defendant, and indorsed by G. S. to the plaintiffs, the defendant being under terms of pleading issuablely, pleaded that he accepted the bill, and delivered

it to G. S. as the plaintiffs' agent and on their account, in part payment of the purchase money on the sale by the plaintiffs to the defendant of a certain ship; that the defendant was induced to purchase the ship by the false and fraudulent representations of the plaintiffs and G. S. then made to him by them—that the ship was as strong as wood and iron would make her, and that she could be sent to sea without any expense. The plea then alleged, that the ship was not, at the time of the representation, as strong as wood and iron would make her, but, on the contrary, was weak and rotten, and a large sum of money was and is required to make the ship fit for sea, which the plaintiffs and G. S. well knew; and further, that there never was any value or consideration for the indorsement of the bill by G. S. to the plaintiffs, or for the plaintiffs being the holders thereof:—*Held*, that the plea was not issuable, and that the plaintiffs were entitled to sign judgment.

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payment of the purchase money on the sale by the plaintiffs to the defendant of a ship or vessel, and that the defendant was induced to purchase the said ship or vessel by the false and fraudulent representations of the plaintiffs and the said G. B. Sully, before and at the time of the sale, knowingly and deceitfully made to the defendant by the plaintiffs and by the said G. B. Sully, as their agents, in procuring such sale, to wit, that the said ship or vessel was as strong as wood and iron could make it, and that the defendant could send the said ship to sea without a ship of expense; and the defendant further says, that the ship was not at the time of the said representation, the sale, as strong as wood and iron can make it, but the contrary thereof, was weak and rotten in her timbers, and a large sum of money was and is required to make the said ship or vessel fit for sea, as the plaintiffs and the said G. B. Sully then, to wit, before and at the time of the sale, well knew; and the defendant further says, that there never was any value or consideration for the indorsement of the said bill of exchange by the said G. B. Sully to the plaintiffs, or for the plaintiffs being the holders thereof.

The defendant being under terms of pleading issue, the plaintiff signed judgment, on the ground that the plea was not issuable. An order was obtained from Mr. Justice B., setting aside the judgment, with leave to the defendant to reply and demur.

In the present Term *Lush* obtained a rule nisi to reverse this order.

Karslake shewed cause.—[*Parke, B.*—The plea sets up at best a partial failure of consideration. The defendant still has the ship.] If the plea is to be viewed in that light, the question will be, whether the Court is disposed to uphold that class of cases (*a*), which may be

(a) See *Trickey v. Larne*, 6 M. & W. 278; and *Jones v. Jones*,

authorities, that such a plea to a bill of exchange is bad. *Parke, B.*—We see no reason for departing from those decisions.] The plea may be supported upon the ground, that, in order to succeed on the trial, the defendant must prove total failure of consideration. [*Parke, B.*—The plea is so framed. It is clearly not issuable. *Martin, B.*—It was my opinion at the time I made the order; but I was very much pressed to allow the plea by a learned counsel who appeared before me to support it.]

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Field, who appeared in support of the rule, was not relied upon.

PER CURIAM (a).—The rule must be absolute. The defendant, however, may amend, and plead on an affidavit of merits.

Rule absolute (b).

(a) *Parke, B., Platt, B., and Martin, B.*

(b) See *Warwick v. Nairn*, post.

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HONIBALL v. BLOOMER and Others.

In an action for the infringement of a patent, the 43rd section of the 15 & 16 Vict. c. 83, makes the certificate of the Judge who tried the cause, that the defendant's particulars of objections have been proved by the defendant, a condition precedent to his right on taxation to any costs in respect of such particulars, even in the case of a non-suit.

THIS was a rule calling on the plaintiff to shew why, in taxing the costs in this action, the Master should not tax the defendants their costs, without regard to particulars of objections delivered herein, and without being certified by the Judge, who tried the cause, that the particulars, or any of them, had been proved by the defendants.

It was an action for the infringement of a patent for improvements in anchors. The defendants pleaded (inter alia) that the subject matter of the patent was not new under the Patent Law Amendment Act, 1852, 15 Vict. c. 83, s. 41, they delivered several particulars of objections, on which they intended to rely in support of their pleas at the trial. The first objection was, that the subject matter of the patent had been made and sold by persons (therein named) at Liverpool, prior to the date of the patent.

At the trial, before *Martin*, B., in Middlesex, the defendants, after opening the case, called a witness, who substantiated the first objection. The learned Judge upon was of opinion, that the evidence put an end to the plaintiff's case, and accordingly the plaintiff was not allowed to proceed. No application was made by the defendants for a certificate of the learned Judge, as required by the 43rd section of the Act. On the taxation of costs, the Master refused to allow them any costs of the particular objections, on the ground that they had not the requisite certificate, or of the witness subpoenaed in support of such particulars, but he allowed the costs of the witness called in support of the first objection, as part of the general costs of the cause.

Sir *F. Thesiger* and *Webster* shewed cause.—The

refused to allow the costs of the objection, as the plaintiff had not obtained the necessary certificate which was required as a condition precedent by the 43rd section of & 16 Vict. c. 83. That section enacts, that, "in tax-costs in any action in any of her Majesty's superior courts at Westminster or in Dublin, commenced after the commencement of this Act, for infringing letters patent, regard shall be had to the particulars delivered in such action, and costs of plaintiff and defendant respectively shall not be allowed in respect of any particular, unless certified by the court before whom the trial was had to have been proved by the plaintiff or defendant respectively, without regard to the general costs of the cause." The terms of this section are clear and express. The object of the section is to put a check against the delivery of unnecessary and frivolous objections by either party. In a late case, which occurred in practice, as many as eighty-four objections were delivered, embodying fifty-three separate patents. No expense is incurred by the opposite party in the examination of all such objections. [*Alderson, B.*—A case occurred before me, where I had, after the cause was tried, to try a large number of issues for the mere purpose of delay. *Platt, B.*—Can the Judge certify upon a nonsuit? The language of the section requires the cause to be *tried*.] The plaintiff relies upon the express words of the enactment. The authority of the Master to allow these costs depends upon the power given by the 43rd section. Here the defendants are prevented from getting these costs. If the Judge cannot, upon a nonsuit, grant a certificate, it is a misnomer. Formerly, under the 6 Geo. 4, c. 50, where the defendant had applied for a special jury, and the plaintiff nonsuited, it was held that the defendant was not entitled to the costs of the special jury: *West v. Grimston*. That statute enacted that the party who should

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(a) 10 B. & C. 689.

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apply for a special jury, should pay the costs occasioned thereby, unless the Judge before whom the cause was tried should, immediately after the *verdict*, certify. The Legislature was obliged to interpose, by passing the 3 & 4 Will. 4, c. 42, s. 35. In *Glynne v. Roberts* (a), where the question arose upon the construction of the 11th section of the 13 & 14 Vict. c. 61, which deprives a plaintiff of costs, in an action brought in one of the superior Courts, where he does not recover a greater sum than that mentioned in that section, excepts in general terms a judgment by default. Parke, B., said, "It is, perhaps, difficult to see the reason why the Legislature have excepted the case of judgment by default. But it is clear that they have done so in unmistakeable terms, leaving judgment by default in the same state as it was before the passing of this Act. The plaintiff is, therefore, entitled to his full costs." The certificate is a condition precedent to the party's right to this particular class of costs. If the defendants were allowed the costs without the certificate, the plaintiff might be made liable to the costs with respect to many of these objections, the proof of which the defendants could not establish.—They also referred to *Losh v. Hague* (b), as a decision

the Act. In *Peddell v. Kiddle* (a), the question upon the 22 Car. 2, c. 9, which enacts, that, in all cases of trespass, &c., wherein the Judge at the trial of the cause shall not certify that the freehold or title of the land mentioned in the declaration was chiefly in question, if the plaintiff recovers less than 40s. damages, he shall not be allowed more costs of suit than the damages; and the Judge held, that, inasmuch as the title did not come in issue, the Judge could not certify, the Act did not apply; and *Kenyon*, C. J., in delivering the judgment of the Court, after referring to the several authorities upon the point, says, "The principle on which those determinations are founded, is, that where the case is such that the Judge decides it cannot, in any view of it, grant a certificate under the Act, it is considered to be a case out of the Act." The case relied upon, of *Glynne v. Roberts* (b), is an authority in the defendants' favour, as shewing that where a statute does not empower the Judge to act, the statute has no application. And, moreover, the 4 Jac. 1, c. 2, gives the defendant costs in the case of a non-suit, according to a well acknowledged principle of law, which is not repealed by a subsequent enactment, except when it do so in express terms, or by reason of its being inconsistent with the prior enactment. The 15 & 16 Vict. c. 43, does not repeal the last-named statute. It is not to be put by putting a strained construction upon the recent Act, to infer that the Judge has the power to try and determine in the truth of the objections after the cause of action itself has been disposed of.

LOCK, C. B.—We are all of opinion that the rule is discharged. The question turns upon the 43rd section of the 15 & 16 Vict. c. 83, which expressly enacts, that no costs shall be allowed any costs in respect of any damages delivered in the action, unless certified by the

(a) 7 T. R. 659.

(b) 9 Exch. 253.

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Judge before whom the trial was had, to have been proved by such party without regard to the general costs of the cause. These particulars, and the costs with respect to them, are wholly the creatures of this Act of Parliament, and the Act makes the Judge's certificate a condition precedent to the recovery of such costs from the opposite party. This provision was intended to operate as a check upon the expenses which might otherwise be created by the unnecessary delivery of a useless number of particulars. The legislature says, that these costs are not to be considered as the general costs of the cause, but as special costs, depending upon the certificate of the proof of the particulars—the proof of which is to be established in some way or other, but in what way I do not give an opinion. It is within the discretion of the Judge either to grant or withhold his certificate. It may be, that the framer of this 43rd section may have neglected to observe the inconvenience likely to arise in the case of a nonsuit, from the want of pointing out the proper mode of trying a large number of matters substantially in issue. With respect to the costs of the issues, there is no doubt that, where the plaintiff is nonsuited, the defendant is entitled to all the costs of the issues, that is to say, of the pleadings and evidence necessary to support them. But as these particulars are the creatures of this statute, and the costs of this particular class of proceedings are declared by the Legislature to be no part of the general costs of the cause, and that, in the absence of a certificate they shall not be recoverable, they are not recoverable; as formerly, in the case of a nonsuit, the defendant was not entitled to the costs of a special jury. It may be, that on some future occasion the Court will come to some conclusion as to the mode of proving the particulars. But we are not called upon to decide that question in this case.

PARKE, B.—The 43rd section of this Act certainly causes considerable embarrassment, but it must be read according

to the ordinary rule of construction; and according to the express words of the section, I think it perfectly clear that the Master cannot allow the costs of the particulars without the Judge's certificate. The enactment is express. In my mind, the power was given to the Judge to grant the certificate as a check to prevent the insertion of an unnecessary number of particulars in support of the pleadings. Where the case is brought to a conclusion without the verdict of the jury, it seems that the defendant, in order to obtain the costs of his particulars, must go on with evidence in support of them, so as to enable the Judge to exercise his judgment upon the matter. And unless the practice of *Nisi Prius* is to be totally altered by calling in the aid of the jury in the case of a nonsuit, they can take no part in the certificate, but it must be left to the Judge alone. It is not necessary, however, now to give any positive opinion upon that point, for I agree with my Lord Chief Baron, that the costs cannot be given without the certificate; still I cannot help thinking that a power must be given correlatively to the Judge to grant the certificate. It is sufficient to say, that, without the certificate, the defendant cannot get these costs.

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ALDERSON, B.—I am of the same opinion. I do not see that any absurdity will result from a literal construction of the statute. It is true, that in the case of *Peddell v. Kiddle* it was held, that in actions of trespass, in which the title to land could not come in question, the Act was inapplicable; but the words of this section are "in any action," which I take to mean that the enactment shall be applicable to every action of this nature. Here the issue raised by the plea is want of novelty in the invention, and the particulars of the objection state the particular places where, and the persons by whom, the invention had been previously used. Assuming that the particulars would have been sufficient, if they had stated in a general way that the

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patent was not new as having been used by various persons, it might be a question, whether in that case it would have been sufficient if the Judge had certified that the particulars had been proved, leaving it to the discretion of the Master to allow the expenses of those witnesses only whose evidence was alone sufficient to establish the proof of the particulars. In that view, the discretion of the Master, with reference to the certificate, might have been introduced, but here there is no certificate whatever. The party is to have the costs of such particulars only as the Judge shall certify to have been proved. The enactment may produce inconvenience, but it is not such as to enable us to say that the intention of the Legislature is other than that which is expressly enacted.

PLATT, B.—I think that the Master was right in refusing to tax these costs. It appears to me that the Legislature intended, by passing this enactment, to keep down the expenses in these actions to such an amount as becomes necessary to the proceedings. We do not sit here as legislators, but to administer the law as we find it, and to construe the statute according to its natural meaning. Now the Legislature by express words has restricted the power of the Master to give costs in those cases where the certificate has been obtained from the Judge who tried the cause. I wholly dissent from the opinion, that the Judge is to receive any evidence not before the jury. He has to receive such evidence as is pertinent to the issue in the cause. In the case of a nonsuit the cause is at an end, and, as it appears to me, the Judge cannot be called upon to decide some other matter which is not in issue. It may, unquestionably, be very hard upon the defendant, but we cannot help that, as the enactment expressly requires the certificate.

Rule discharged.

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HAMILTON v. BELL and Another, Assignees of E. BEVIN,
a Bankrupt.

Nov. 18.

TROVER for clocks. Pleas, not guilty and not possessed.
—Issues thereon.

At the trial, before *Martin*, B., at the Middlesex sittings in the present Term, it appeared that the action was brought for the conversion by the defendants, who were the assignees of one Bevin, a bankrupt, of some clocks which the plaintiff had purchased from the bankrupt. Bevin was a clock and watch maker, and had a shop in the city of London, where he exposed for sale a large number of ornamental clocks and watches. A large portion of his business consisted in repairing and cleaning clocks and watches, which work was done in the shop where the clocks and watches were exposed for sale, and such of the clocks as were under repair usually stood amongst those which were for sale. On the 14th of July, 1853, the plaintiff, who had dealt with Bevin for several years, bought of him one of the clocks in question, and at the request of the plaintiff, who stated that he had taken a new house and that he should not require the clock before he had settled in it, it was agreed that the clock should remain in the shop till that time. In the following month of March, Bevin, being in want of money, applied to the plaintiff for assistance, and the plaintiff pur-

Goods of a third party in the possession of a bankrupt at the time of his bankruptcy, do not pass to his assignees under the 125th sect. of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, unless the goods are in the bankrupt's possession under such circumstances as make him the reputed owner of them, and have also been left in his possession, order, and disposition by the consent and permission of the true owner improperly, under circumstances calculated to enable the trader to

obtain false credit by the possession of the goods.

The question of reputed ownership, within the meaning of this section, is one purely of fact. The plaintiff purchased some clocks of a London tradesman, who kept a shop, in which were exposed for sale clocks and watches. A portion of the tradesman's business was to clean and repair clocks, and such as were sent to him for that purpose stood amongst those in the shop which were for sale. The plaintiff left the clocks which he had purchased with the tradesman, with directions that they were to be sent to him when they had been cleaned and put in order. The tradesman some time afterwards became bankrupt, the plaintiff's clocks still remaining in his shop. In an action by the plaintiff against the assignees for taking these clocks,—*Held*, that, under the circumstances, there was no evidence either that the bankrupt was the reputed owner of the goods, or that they were in his possession, order, or disposition, within the meaning of the above-named section; and, consequently, that the goods did not pass to the assignees.

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chased two more clocks, which were also left in the shop and which stood among other clocks which were for sale. These clocks were to be sent to the plaintiff's house where they had undergone the necessary cleaning, which would take a few days to perform. At the time of the sale the small tickets upon the back of each of the clocks, denoting the price, were taken off. On the 7th of April, 1854, a fiat in bankruptcy was issued against Bevin, and he was duly adjudicated a bankrupt. At that time these clocks were in his shop. An order having been made by the Commissioner in bankruptcy for the sale of the clocks, the defendants, as assignees, took possession of them.

Under these circumstances, it was contended on the part of the defendants, that the goods were, at the time of the bankruptcy, in the possession, order, and disposition of the bankrupt, as reputed owner, by the consent and permission of the true owner, within the true meaning of the 125th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, and consequently that they were entitled to the verdict. The learned Judge directed a verdict for the plaintiff, leave being reserved to the defendants to move to enter a verdict for them, if the Court should be of opinion, under the circumstances, that the case fell within that section.

Lush now moved accordingly.—The question is, whether these goods were in the possession, order, or disposition of the bankrupt by consent of the owner, and of which the bankrupt was reputed owner, within the meaning of the 125th section of the 12 & 13 Vict. c. 106 (a). It is sub-

(a) That section enacts, "That if any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy."

d that they were. It is a material fact in this case, the bankrupt had the possession of the goods in question as owner, before the sale to the plaintiff; and that, the sale, they remained in his possession. There is an important distinction between such a case as this and in which the bankrupt never was the owner of goods and in his possession at the time of the bankruptcy. *Hard v. Messiter* (a) was an action by the assignees of a bankrupt, brought to recover property in the bankrupt's possession as reputed owner. On the part of the plaintiffs, it was proved that the bankrupt had once been the real owner of the goods in question, and that he continued in possession of them until he committed an act of bankruptcy, it was there held that these facts afforded *prima facie* evidence that he continued in possession as owner, and that it lay on the defendant to prove that the bankrupt had ceased to be the reputed owner. The defendant proved, that, before the act of bankruptcy, the goods had been sold under an execution at the suit of a creditor, and that afterwards demised them at an annual rent to the bankrupt, who continued in possession of them till the time of the bankruptcy. Soon after the bill of sale was executed, the creditor's initials were marked on all the goods. It was held that this was no evidence of the notoriety of the sale of property, and consequently that there was no evidence to go to the jury that the bankrupt had ever ceased to be the reputed owner. Again, in *Knowles v. Hors-* (b), a spirit merchant sold to a wine merchant several casks of brandy, some of which at the time of the sale were in the vendor's own vaults, and others in the vaults of a warehouse keeper; and it was agreed between the parties that the brandies should remain where they were until the vendee could conveniently remove them. Im-

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carrying on the wine trade at the place where the party resided, that this sale had taken place, but no notice of sale had been given to the warehouse keeper, with whom some of the casks had been deposited. The vendor having become bankrupt while the brandies remained where they were originally deposited, it was held that the whole of them passed to his assignees as goods in his possession, order, and disposition, by the consent and permission of the true owner, within the 21 Jac. 1, c. 19, s. 11. [*Pollock C.*—If the question were one of law, we should feel ourselves bound by those decisions; but it is a question of fact, the decision of which depends upon all the circumstances of the particular transaction. *Alderson, R.*—A decision which is unquestionable in one century, might not be applicable to a case under apparently the same set of circumstances in the next century, owing to the change which has in the meantime taken place in the dealings of mankind. In olden times, gentlemen did not job their carriages. They not only do so now, but they have their own coat of arms upon the carriage. So, again, it is customary in the North of England for manufacturers to hire machinery. *Parker, B.*—I have always considered that the best exposition of the meaning and object of the words, "in his order and disposition with consent of the true owner," is that which is given by Lord *Redesdale* in *Joy v. Campbell* (a), where, in commenting upon the 11 & 12 Geo. 3, c. 8, s. 9, which contains those words, he says, "That clause refers to chattels in the possession of the bankrupt, 'in his order and disposition, with consent of the true owner;' that means, where the possession, order, and disposition is in a person who is not the owner, to whom they do not properly belong, and who ought not to have them, but whom the owner permits unconscionably, as the Act supposes, to have such order and disposition. The object was to prevent deceit by a trader from

(a) 1 Sch. & Lef. 336.

ible possession of a property to which he was not entitled but in the construction of the Act, the nature of the possession has always been considered, and the words have been construed to mean possession of the goods of another without the consent of the true owner." This clause in the present Act certainly belongs to a time of commerce more remote than the present; for, in dealings with tradesmen, a creditor does not now look to the goods themselves so much as to the general character of his debtor. All that is said in this case is, that it was doubtful whether the clocks in Bevin's shop were, or were not, his property. In a doubtful state of things, his creditors are bound to make proper inquiries upon the subject. *Alderson*, B.—Of the clocks there were some there for the purpose of being repaired, others were for sale. How can it be said that the possession of these particular clocks made him the legal owner. *Martin*, B.—I certainly thought at the time that the difficulty consisted in saying where the line was to be drawn as to which of the articles would pass to the creditors, and which would not. *Pollock*, C. B.—I cannot say that any person going into a watchmaker's shop in London, where clocks are both sold and repaired, could suppose that all the clocks and watches which he sees there are the property of the shopkeeper.]

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LOCK, C. B.—I am of opinion that there ought to be a distinction. My Brother *Alderson*, in the course of the argument, has properly observed that the same evidence at one period of time ought apparently to produce a different result upon a question like the present, might at a different period very properly produce a different result, on account of a change of circumstances arising from an alteration in the course of the business of the world. The case of *Redd v. Messiter* (a) affords a very good example of

(a) 1 B. & C. 308.

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what might result from such a change of circumstances. At the time when that case was decided, it is possible that the jury were fully justified in their verdict, and that the Court was right in upholding that verdict. But if the same question were to arise at the present day, such a decision might be altogether incorrect, for it is now notorious that persons using machinery frequently hire it, and consequently there is no presumption that machinery found on a manufacturer's premises belongs to him. So in the case of a carriage in the possession of a gentleman, it cannot be inferred from the fact of its bearing his coat of arms that the carriage is his property, since it is equally notorious that carriages are more frequently jobbed than purchased by the users of them. The same observation is applicable to a variety of other articles which are commonly hired. There is a class of tradesmen who, though neither brokers nor agents, nevertheless are in possession of property, the greatest portion of which belongs to other people; for instance, silversmiths and jewellers, who have in their possession for years furniture, plate and jewels of great value; and such articles, whether exhibited or not, in the case of the bankruptcy of the tradesman, ought not to pass to his assignees. Now, the 125th section of the Act says, that, "If any bankrupt, at the time he becomes bankrupt, shall, with the consent and permission of the true owner thereof, have in his possession, order, or disposition,"—and acting upon the rule frequently adopted in reading modern statutes I should read the word "or" here as "and"—"any goods or chattels whereof he was reputed owner, &c." In my opinion, although the bankrupt had the possession of these goods, yet he had not the order and disposition of them; for he could not rightfully have disposed of them, and no one would be entitled to presume from that possession that he had any such right. There is one observation that may be made with reference to this clause. If it was intended to prevent traders from deluding persons by the apparent ownership of property,

hereby gaining false credit, it is very unfortunate should entirely fail in that object, for if the owner of sends them to a shop for the express purpose of ng the possessor to delude the public by obtaining redit, and afterwards takes them back again, though very short time before the bankruptcy, the re-delivery is not of itself an act of bankruptcy. That was so in a recent case tried at York (a). It is, therefore, to be lamented that the clause in question should re- as a snare; but, at all events, we are not bound to give i a vague and loose construction as would lead to ping people who have left their goods in the possession rra, as the plaintiff here has done. I think that the ew of the clause is that taken by Lord *Redesdale* in se of *Joy v. Campbell*, referred to by my Brother , namely, that such enactments apply only to those n which the true owner of the goods has been guilty e impropriety in leaving them in the possession of the rpt.

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PERSON, B.—The true exposition of the 125th section 1. The goods to be sold for the benefit of the credi- re those of which the bankrupt has become the re- owner by the consent and permission of the true who has made him so by placing the goods in the and disposition of the bankrupt, under such circum- s as he must reasonably know will lead the world to he bankrupt as the true owner. Thus, if property be o a shop where goods are sold as the property of the eeper, that property is placed in such a situation as, eyes of the world, would fairly lead to the inference t belongs to the possessor; and such a case falls

His Lordship, perhaps, re- to *Young v. Hope*, 2 Exch. e, also, *Graham v. Furber*,

14 C. B. 134; and *Pariente v. Pen- nell*, 2 Moo. & Rob. 516.

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within the meaning and spirit of this clause of the statute and such goods would go to the assignees, to be disposed of for the benefit of the creditors. But if, as here, the goods are left in a shop where it is notorious that goods are placed for other purposes than sale, namely, for the convenience of the owners, the conclusion cannot be reasonably drawn that the goods are the property of the shopkeeper. In this case the clocks were left in a shop where it is notorious that persons leave their clocks to be repaired; how then can we draw the conclusion that the bankrupt was the reputed owner of them. When we find that the shopkeeper is not the owner of even the larger proportion of the goods in his shop, how can we conclude that he is owner of any? In such a case the criterion which the statute provides does not apply, and the only question is, whether the bankrupt is the true owner or not. In *Lingard v. Martin* the bankrupt, though at the time in possession of the articles, had been the owner of them at a prior date, and had continued in possession from the time when he ceased to be the real owner. The transfer of the goods was by public sale under a writ of execution, and the goods were conveyed by a bill of sale to the execution creditor, and he demised them to the bankrupt. The Court thought it unreasonable to hold that there was any evidence of the notoriety of the change of property, so as to warrant a jury in finding that the bankrupt had ever ceased to be the reputed owner. I must say that I think the Court overlooked the importance of the publicity of the sale. The circumstances of that case arose in Somersetshire. It is well known that it is a common practice for manufacturers in Lancashire to hire machinery, so that the possession of machinery there is not evidence of ownership. If the same practice does not prevail in Somersetshire, the same inference could not be drawn. *Knowles v. Horsfall* merely sets forth a particular state of facts from which the Court

were to draw their own conclusion, and for that reason I regret that I reported it.

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MARTIN, B.—I fully concur in the opinion of my Brother Alderson. Goods left in the possession of a bankrupt by the consent of the true owner do not pass to the assignees, unless the inference can be drawn that all the goods found in his possession are his; and, as no such inference can be drawn in this case, the only question is, whether the bankrupt or the plaintiff is the true owner of these clocks; and, as it appears that the plaintiff is, he is entitled to recover.

PARKE, B.—I am of the same opinion. These cases involve the determination of two questions: First, whether the circumstances under which the article is left in the possession of the third party carry the reputed ownership; and secondly, it being established that they do, whether the article was left, with the consent of the true owner, in the bankrupt's possession, under such circumstances as are pointed out by Lord Redesdale in the passage to which I have referred. In the present case, then, the first question is, what is the effect of these clocks having been left by the owner in the clockmaker's shop? Now, as it is a common practice for clockmakers to expose for show in their shops clocks which have been left by their customers to be repaired or cleaned, it is not to be inferred that all the clocks in the shop are the shopkeeper's, and, consequently, the fact of these clocks being left in the bankrupt's shop does not afford any evidence of reputed ownership; and no false credit is gained thereby, for the shopkeeper may, or he may not, be the owner of such clocks as are exposed in the shop. Secondly, if the question of reputed ownership had been established, this case does not fall within the principle already enunciated. With respect to the two last clocks, which were purchased by the plaintiff and in which the property

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passed, the bankrupt's possession of them was not such as he ought not to have had. These clocks must be considered in the same situation as if the plaintiff had received them at his house after the purchase, and had afterwards sent them back to be repaired. The bankrupt's possession of these clocks was rightful, and the assignees have no claim for them. A more serious question might have arisen as to the clock which was first purchased, and which had remained in the bankrupt's possession for so considerable a time, that there had been any ground for saying that there was any evidence of reputed ownership in that case. But there was none. I do not quarrel with the decision of *Lingard v. Messiter*, upon the facts before the Court. If it had appeared that there existed a practice of hiring machinery, that decision might give rise to doubts. In *Knowles v. Horsfall*, the stock of wines in the possession of the bankrupt was apparently his, for there was no evidence that a tradesman in the capacity of the bankrupt in that case held possession of the goods of other persons. *Prima facie*, therefore, they were his, and he was the reputed owner. For these reasons, I agree in thinking that there ought to be no rule.

Rule refused.

1854.

and Others, Assignees of J. C. PETERS, a Bankrupt,
v. HART.

Nov. 22.

OVER for woollen cloths and other drapery goods.—
First count of the declaration alleged a possession by
s, and a conversion before the bankruptcy. The
d count alleged a possession by the plaintiffs as as-
es, and a conversion after the bankruptcy.

e defendant pleaded,—First, to the whole declaration,
guilty. Secondly, to the first count, that the goods
not the goods of Peters. Thirdly, to the second count,
the goods were not the goods of the plaintiffs as such
ees. Upon these pleas issues were joined.

the trial, before *Pollock*, C. B., at the London Sittings
last Trinity Term, it appeared that the action was
ht by the plaintiffs as the assignees of one Peters, a
upt, to recover the value of a large amount of drapery

, which had been sold by Peters to the defendant,
the following circumstances:—In September, 1853,
set up on his own account as a draper at Southamp-

He had only a small capital of his own, but he
enced business by obtaining a very large stock of
upon credit, which, according to the custom of the
y trade, was for between four and five months. In
nber following, the defendant Hart, who carried on
ss in St. Mary-axe, Aldgate, London, and described
f as a job dealer in drapery, called at the shop of
, and asked him "if he had anything to dispose of
vas jobbish;" and on that occasion Peters sold the

A sale by a
trader of his
goods, at prices
considerably
below their
market value,
is not of itself
a fraudulent
transfer with-
in the 67th
section of the
Bankrupt Act,
12 & 13 Vict.
c. 106. To ren-
der the trans-
action fraudu-
lent within
that Act, the
trader must
have intended
by such sale
to defeat or
delay his cre-
ditors, and the
purchaser
must have
been aware of,
or have had
reasonable
ground for sus-
pecting, such
intention.

A trader
commenced
business by
obtaining a
stock of goods
on credit, and
then, from
time to time,
sold a quantity
of the goods
to the defend-
ant, another
trader, at
prices, in

stances, less than two-thirds of their real value. These transactions continued for
months, when the trader became bankrupt. It appeared that his bankruptcy pro-
ntirely from these sales:—*Held*, that there was no evidence of an intention on the
the trader to defeat his creditors, and even if there was, there was no evidence to
the conclusion that the defendant was aware of such intention.

X.

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EXCH.

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v.
HART.

defendant certain goods, for which Hart paid him between 80*l.* and 90*l.* in cash, being between 30 and 50 per cent. below the invoice price and true value of the goods. After this, and up to April following, several transactions of a similar character, in all between twenty and thirty, took place between Peters and the defendant, the goods being sold in every instance at less than two-thirds of their real value, and the defendant having paid in the whole about 3000*l.* The goods were sent by rail to the defendant's place of business in London. On the 4th of April, 1854, Peters stopped payment, and on the 12th was duly adjudicated bankrupt. It further appeared that the bankrupt's debts were very large, and that he had not suffered any loss from bad debts, but that his failure proceeded entirely from the above-mentioned sales of the goods at prices under their value.

On the part of the defendant, it was submitted that there was no evidence of any damage to the estate. The Lord Chief Baron, in leaving the case to the jury, directed them in the language adopted by Lord *Tenterden*, C. J., in the case of *Cook v. Caldecott* (a), and told them that if they thought that the defendant, as a man of business, ought to have known that Peters must have effected these sales, or any of them, for the purpose of putting the proceeds into his own pocket and defrauding his creditors, the plaintiffs were entitled to the verdict. The jury found a verdict for the plaintiffs, damages 600*l.*; and leave was reserved to the defendant to move to reduce the verdict to nominal damages, and to the plaintiffs to increase the amount found to 3000*l.*, being the difference between what was alleged by the plaintiffs to be the true value of the goods and the sum which Peters had received for them from the defendant.

In the present Term, *Edwin James*, on the part of the defendant, and *Watson*, on the part of the plaintiffs, obtained rules, in pursuance of the leave reserved.

(a) Moo. & M. 522.

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v.
HART.

Watson, Cleasby, and Huddleston shewed cause against the defendant's rule (November 21 and 22).—Each of the transactions between Peters and the defendant amounted to a fraudulent transfer of the trader's goods, with intent to defeat his creditors. [*Parke, B.*—The plaintiffs must select one of the several transactions upon which they intend to rest their case.] The whole of the numerous dealings between these parties ought to be taken into consideration, for the purpose of shewing what the real nature of each was. [*Parke, B.*—Still you are bound to prove an act of bankruptcy, and must therefore fix upon some one particular transaction, and shew that it was a fraudulent transfer within the meaning of the statute (a). In *Winter v. Pritchard* (b), the Court of Queen's Bench said, that Lord Tenterden, in *Cook v. Caldecott*, left it substantially to the jury to decide whether the purchaser was aware of the trader's intention to defraud his creditors of the money raised by the sale of portions of his stock in trade. If a trader sells goods with the intention of absconding with the proceeds and cheating his creditors, the transfer itself according to that case is not *fraudulent*, but if the purchaser is aware of such intention, and is a party to the fraud, that would, no doubt, be an act of bankruptcy. Here the scheme was carried on for a considerable time; and how can any particular transaction be pointed out in which the trader can be said to have had such intention?] All these transactions were out of the usual course of business. They were fraudulent, and deprived the trader of the means of paying his creditors. [*Parke, B.*—The question is, whether a real sale of goods by a needy trader, at a price much below their true value, is of itself an act of bankruptcy?] It is not essential that any individual act of the trader should have the effect of delaying his creditors, for evidence of intent is sufficient. In *Robertson v. Liddell* (c), it was held, that the departure

(a) 12 & 13 Vict. c. 106, s. 67. (b) 1 A. & E. 456. (c) 9 East, 487.

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of a trader from his dwelling-house, with intent to delay his creditors, is an act of bankruptcy though no creditor be thereby in fact delayed. In *Worsley v. De Mattos* (a), the question was first raised, whether the conveyance by the trader of the *entire* of his property was an act of bankruptcy; and it was held to be so. *Siebert v. Spooner* (b) and *Lindon v. Sharp* (c) are to the same effect. The plaintiffs contend for the broad proposition, that, where the trader professes to sell his goods under their value, with intent to cheat his creditors, and the purchaser is a party to it, such colourable sale is an act of bankruptcy. [Parke, B.—Suppose the purchaser knows that such a system of trading is ruinous, is that sufficient? If it were, every sale of goods under their value might be an act of bankruptcy.] In *Young v. Waud* (d), Parke, B., in speaking of acts of bankruptcy, says that they are confined “lastly to those” (acts) “where there is a transfer of property, which must necessarily in its results be known to the bankrupt to lead to the delay and disappointment of all the creditors, with the exception of that particular individual to whom the transfer is made.” Lord Mansfield, C. J., in *Cadogan v. Kennett* (e), in referring to the 13 Eliz. c. 5, and 27 Eliz. c. 4, the statutes against covenous transactions, said: “These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud.” Here the jury have in effect found that the trader was acting fraudulently, and with intent to delay his creditors, when he transferred the goods to the defendant and that the defendant was a party to that transaction. Both parties were not only fully cognizant of, but aiding and abetting, a fraud. There was abundant evidence to support the finding of the jury. It was not the case of one isolated transaction, but of numerous sales of goods below their real value; so that the defendant must have known that the ne-

(a) 1 Burr. 467.

(d) 8 Exch. 221.

(b) 1 M. & W. 714.

(e) Cowp. 432.

(c) 6 M. & Gr. 895.

necessary consequence of such sales would be to defeat creditors.—They also referred to *Ward v. Clarke* (a).

Edwin James and *Willes* appeared to support the rule, but were not called upon to argue.

POLLOCK, C. B.—There was certainly some evidence to bring the case within the doctrine laid down by Lord *Tenterden* in *Cook v. Caldecott*, and we are all of opinion that an opportunity ought to be afforded of reviewing that doctrine in a Court of error. There must, therefore, be a new trial.

PARKE, B.—The statute means a fraudulent gift or delivery, or transfer of goods, with intent immediately by that act to defeat or delay creditors, as a gift or delivery of goods on the eve of bankruptcy frequently is; but there may be a transfer of goods by sale, with a fraudulent intent on the part of the trader, which is nevertheless a valid transaction. If a trader sells goods at a less price than they are worth, and makes a practice of it, though it is obvious that such a practice must *ultimately* end in bankruptcy, none of such sales, simply as such, constitutes an act of bankruptcy; and even where the trader intended, on a particular sale, to swindle away with the price, and cheat his creditors, such sale is not an act of bankruptcy. But if the purchaser is a party to that intention, then it would be a fraudulent transfer within the statute. This appears to have been the meaning of Lord *Tenterden*, in *Cook v. Caldecott*, as explained by the Court of King's Bench in *Baxter v. Pritchard*. Here the question was, whether an assignment by a trader of his whole stock, with intent to abscond with the purchase money, was, of itself, an act of bankruptcy; and the Court properly held, that, as the purchaser paid a fair price for the goods, and was ignorant of the trader's design, the sale was not fraudulent within the Bankrupt Acts, though the bankrupt intended to commit a fraud. Paying a fair price, I consider as not being essential to the validity of the sale,

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(a) 1 M. & M. 497.

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but a circumstance tending to disprove a fraudulent participation on the part of the purchaser. Lord Denman, C. J., in delivering judgment, says, that "in *Cook v. Caldecott* Lord Tenterden left it substantially to the jury to say, whether the purchaser was aware of the trader's intention to defraud his creditors of the money raised by the sale of portions of his stock in trade. So here, if the trader sold the goods, with the intention that the proceeds should be abstracted from the general body of creditors, and the purchaser was aware of that fact, and so a participator in the fraud, the sale would be an act of bankruptcy. But there is no one transaction in this case, in which it could be predicated, that there was an intention on the part of the seller to abscond with the price; and even assuming that the trader so intended, there is no sufficient evidence to warrant the conclusion that the purchaser was aware of such intention, so as to make him a party to the fraud, and to render the sale fraudulent. Buying goods at an under-rate would be evidence of guilty knowledge, if the vendor had no right to sell; and if the purchaser had been indicted for receiving stolen goods, knowing them to be stolen, that fact would have been evidence of such knowledge; but a sale at a low price simply, is not a fraudulent one, within the meaning of the Bankrupt Act. I have no scruple in saying, that, if the point had been reserved, as to whether there was reasonable evidence of an act of bankruptcy, there was no such evidence; for there was none of an intention on the part of the trader to run away with the purchase money, or of the purchaser being aware of that intention. However, the point not having been reserved, there must be a new trial.

ALDERSON, B.—I agree that we ought not to act upon the law as laid down by Lord Tenterden in *Cook v. Caldecott*, without affording an opportunity of testing it.

PLATT, B.—If a person goes to a shop, and seeks to buy goods as cheap as possible, how does he become a party to a fraud because he gives a small price for the goods?

He has nothing to do with the manner in which the seller intends to apply the money. If, indeed, the sale was not *bonâ fide*, but merely colourable, the case might be different; but because a person does not give the full market price for goods, what ground is there for saying that he is a party to an act of bankruptcy?

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HART.

Rule absolute for a new trial.

In re ALLISON.

Nov. 21.

HUDDLESTON, on a former day (a), had obtained a rule calling on the keeper of the House of Correction at Stafford, to shew cause why a writ of habeas corpus should not issue to bring up the body of Joseph Allison, in order that he might be discharged out of custody.—The prisoner had been convicted by two justices of the peace, under the 16 & 17 Vict. c. 30, of an aggravated assault upon a child under seven years of age, and was committed to prison under the following warrant:—

County of } To the constable of the parish of Yoxall, and
Stafford, } the keeper of the House of Correction at
to wit. } Stafford, in the said county of Stafford.

Whereas Joseph Allison, of the parish of Yoxall, in the said county, was this day duly convicted before the under-

Warrants of commitment, convictions, and other instruments made by magistrates, are sufficient, if they correspond with the forms given in the schedule to the 11 & 12 Vict. c. 43.

The 16 & 17 Vict. c. 30, empowers two justices of the peace to punish, on summary conviction for assaults committed on females, or children under

fourteen years, any person charged before them "*sitting at a place where the petty sessions are usually held*."—*Held*, that a warrant of commitment for such offence, in the form given by the 11 & 12 Vict. c. 43, sched. (P. L.), was good, although it did not state that the justices before whom the party was charged were sitting at a place where petty sessions are usually held.

As no certiorari issues out of the Court of Exchequer, a conviction is properly brought before it, if verified by affidavit.

A commissioner before whom an affidavit is sworn, ought to certify that any exhibit annexed is the document referred to in the affidavit.

(a) The Court of Queen's Bench had previously refused a rule nisi on the same day. But the learned counsel, on moving the rule in this Court, said, "that he was now armed with certain authorities, with which he had not been prepared in bringing the case before the Court of Queen's Bench."

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ALLISON.

signed, two of her Majesty's justices of the peace for the said county, upon a charge made upon the complaint of Daniel Burgen, for that he the said Joseph Allison, on the 27th day of October, 1854, at the parish of Yoxall, in the said county, did by violently striking and beating with a cane, whip-stock, and otherwise ill treating, unlawfully commit an aggravated assault upon one George Allison, a male child under the age of fourteen years, to wit, of the age of seven years, contrary to the statute in such case made and provided; and we, the said justices, being of opinion, at the time of the hearing and determination of the said offence and the conviction of the said Joseph Allison, that the said assault is of such an aggravated nature, that it cannot, in the opinion of the said justices, be sufficiently punished under the provisions of the statute 9 Geo. 4, c. 31: it was thereby adjudged, that the said Joseph Allison, for his said offence, should be imprisoned in the house of correction at Stafford, in the said county, and there kept to hard labour for the space of six calendar months. These are, therefore, to command you the said constable to take the said Joseph Allison, and him safely convey to the house of correction at Stafford aforesaid, and there to deliver him to the keeper thereof, together with this precept;—And we do hereby command you the said keeper of the said house of correction, to receive the said Joseph Allison into your custody in the said house of correction, there to imprison him and keep him to hard labour for the space of six calendar months; and, for so doing, this shall be your sufficient warrant.

Given under our hands and seals, this 31st day of October, at Burton-upon-Trent, in the county of Stafford.

R. P. (L. S.)

H. F. M. (L. S.)

Scotland now shewed cause, and produced the conviction. This document purported to be verified by an affidavit, which stated, that "The writing hereunto annexed is the

f the above-named Joseph Allison, formally
d under which the said Joseph Allison was, by
commitment, dated the 31st of October, 1854,
arrant of commitment referred to in the affi-
which the rule in this case was obtained), com-
custody of the keeper of the house of correc-
rd." But the commissioner, before whom the
sworn, had omitted to certify that the docu-
d was that referred to in the affidavit.

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m objected, first, that the conviction could not
smuch as it had not been removed into this
t of certiorari.

submitted, that, as no certiorari issued out of
e only mode in which the conviction could be
re it was by producing the conviction verified

m referred to *Regina v. Chaney (a)* and the
mond's case (b), as authorities, that the Court
t a conviction, unless it is regularly brought be-
t of certiorari. [*Alderson*, B.—If that were so,
o was improperly convicted, could never obtain
eas corpus in this Court. And, moreover, in a
present, the consequence would be, that though,
ation to the Court of Queen's Bench, the rule
ed, yet the party might obtain a different deci-
ourt, because it has no power to bring the con-
e it by certiorari. *Parke*, B.—Since there is
le of bringing the conviction before the Court,
t to produce it verified by affidavit.]

m then objected that the conviction was not
fied, since the commissioner before whom the

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ALLISON.

affidavit was sworn, had not certified that the document annexed was that referred to in the affidavit.

POLLOCK, C. B.—The Master reports to us, that, according to the practice of the Court, the commissioner ought to have certified that the exhibit annexed was the document referred to in the affidavit.

Upon the suggestion of the Court this objection was waived and the conviction read (a). The Court then called upon

(a) The conviction was as follows:—

County of } Be it remembered,
Stafford } that, on the 31st day
to wit. } of October, A.D. 1854,
at the petty sessions held at the
police station in Burton-upon-
Trent, in the said county of Staf-
ford, the said police station being
a place in Burton-upon-Trent
aforesaid, in the said county,
where the petty sessions have
been and are usually held, Joseph
Allison, of the parish of Yoxall,
in the said county of Stafford,

a cane whip-stock, and otherwise
ill-treating, unlawfully commit
an aggravated assault upon one
George Allison, a male child un-
der the age of fourteen years, to
wit, of the age of seven years,
contrary to the statute in such
case made and provided: We the
said justices being of opinion, at
the time of the hearing and de-
termination of the said offence,
and the conviction of the said
Joseph Allison, that the said as-
sault is of such an aggravated
nature that it cannot in the

1864.
In re
ALLISON.

Huddleston to support the rule.—The question turns upon the validity of the warrant of commitment alone. The warrant is invalid, on the ground that it does not shew that the justices by whom it was made had jurisdiction. The 16 & 17 Vict. c. 30, under which the defendant was charged, gives jurisdiction to two justices of the peace sitting at a place where the petty sessions are usually held." This ought to appear affirmatively upon the face of the instrument itself. In *Rex v. York* (a), Lord Mansfield, C. J., said, that "it ought to be shewn that the person convicting had authority to convict." In Paley on Convictions, page 236, it is laid down, that it is not necessary that a warrant should state the conviction in a precise or technical form, "but only so as to shew that the party has been convicted of some specific offence, and by a person having authority for that purpose." [*Parke, B.—Rex v. Walter* (b) is cited for that position, but I do not see that the case is any authority for it.] The following decisions may be referred to for the purpose of shewing how the Courts have regarded these instruments: *Regina v. Cavanah* (c), *Regina v. Chaney* (d), *In re Peerless* (e), *Lindsay v. Leigh* (f). [Scotland referred to the 24th section of the 11 & 12 Vict. c. 43, which enacts "that where a conviction does not order the payment of any penalty, but that the defendant be imprisoned, or imprisoned and kept to hard labour, for his offence; or, where an order is not for the payment of money, but for the doing of some other act, and directs that, in case of the defendant's neglect or refusal to do such act, he shall be imprisoned, or imprisoned and kept to hard labour, and the defendant neglects or refuses to do such act; in every such case it shall be lawful for such justice or justices making such conviction or order, or for some other justice of the peace for the same county, riding, divi-

(a) 5 Burr. 2684.

(d) 6 Dowl. P. C. 281.

(b) 8 Mod. 5.

(e) 1 Q. B. 143.

(c) 1 Dowl. N. C. 546.

(f) 11 Q. B. 455.

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In re
ALLISON.

sion, liberty, city, borough, or place, to issue his or their warrant of commitment (P. 1, 2) under his or their hand and seal, &c." This warrant follows the form given in the schedule (P. 1).] That form does not apply to an offence under the later statute. The commitment given by the form (P. 1) has reference to commitments made by justices acting in and for the county, &c. The hearing in this case must be before justices in petty sessions. And therefore the form suggested by the prior Act ought to be remodelled to meet the law as enacted by the 16 & 17 Vict. c. 30. In *Geswood's case* (a), which is a recent decision, it was held, that, although a commitment of a servant under the 4 Geo. 4, c. 34, s. 3, for absenting himself need not set forth the evidence on which the conviction proceeded, still it must shew on the face of it, that the prisoner has been convicted of what is an offence within the Act. [*Parke, B.*—There the statement of the offence was defective, but the place where the justices sit is no part of the offence with which the defendant is charged. That case, therefore, does not apply.]

POLLOCK, C. B.—We are all of opinion that this rule

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In re
ALLISON.

I feel it necessary to take time to consider whether the rule ought not to be laid down upon the subject. This is a consideration which becomes altogether immaterial. The statute was passed for the express purpose of obliging magistrates to use certain forms to be used in particular by the adoption of which they might protect themselves, and render their proceedings free from all objection. 1 & 12 Vict. c. 43, according to its title, is "An Act to facilitate the performance of the duties of Justices of the Peace sitting out of Sessions within England and Wales with respect to summary convictions and orders." And upon issuing the warrant of commitment in this case with the form given in the Schedule (P. 1.), it is found to correspond with it precisely. But Mr. *Huddleston* contends, that at the time this statute passed, it was sufficient if the magistrate acting was one in and for the county, and therefore that the statute was framed for that particular state of things; but that since it came into operation a statute has been passed of a highly penal character, empowering two justices to inflict most severe punishment; and that, in order to guard against abuse in the exercise of such authority, the hearing must take place before two justices in sessions; and the learned counsel contends, that the court should state these facts. But I do not think there is any weight in that argument. The statute requires a form to be adopted by magistrates, and they are not called upon to reason upon the matter, and to say that, because the law in some respect has been altered, therefore they must alter the form. The statute expressly enacts, that, where a warrant is required, it must be drawn up in the form given in the schedule. Here the justices have adopted the form given, and the commitment is good.

MR. JUSTICE B.—I am of the same opinion. I think it unnecessary to say anything as to the grounds on which the

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In re
ALLISON.

Court of Queen's Bench disposed of this case when it was before them; and I entirely agree with the Lord Chief Baron, that, if justices substantially adopt the forms given by the 11 & 12 Vict. c. 43, they do all that is required of them. If this were not so, the Act itself would prove only a snare to entrap persons. Now, this warrant of commitment corresponds precisely with the form given by the Act, and sets out all that is required. It is, therefore, valid. I do not quarrel with an enactment which affords protection to magistrates by removing technical objections to formal proceedings.

ALDERSON, B.—I am of the same opinion. Since the passing of the 11 & 12 Vict. c. 43, all that magistrates have to do in drawing up warrants and convictions is to follow the forms given, and that they have done. There is no actual hardship here; for, if the conviction was made without jurisdiction, the prisoner may remove and quash it. The objection to the form of this commitment is purely of a technical character.

PLATT, B.—If the 11 & 12 Vict. c. 43, had been brought before the attention of the Court when the rule was moved, it would not have been granted. The learning of the cases prior to it has been swept away by the 24th section, which enacts that it shall be lawful for the justice to issue his "warrant of commitment (P. 1)." The warrant here follows the form, and is, therefore, good. We have no power to repeal an Act of Parliament; and there is no rule more wholesome than that which prevents technical objections from interfering with the administration of justice.

Rule discharged (a).

(a) See *Reg. v. Hyde*, 21 L. J., M. C., 94.

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MICHAELMAS VACATION, 18 VICT.

WILLIAMS v. THE LONDON COMMERCIAL EXCHANGE
COMPANY.

Dec. 4.

THE first count of the declaration stated, that the plaintiff employed the defendants in the way of their business as share-brokers, for commission to be paid by the plaintiff to the defendants in that behalf, to purchase for the plaintiff, when and as soon thereafter as the defendants could, one hundred shares in the Great Northern Railway Company, at the market price of such shares for the time being; and although the defendants then could and ought to have purchased for the plaintiff such shares, at the then market price thereof, the defendants did not then purchase such shares, or any part of them, but fraudulently and wrongfully neglected and omitted to do so, &c.—There were other counts in respect of other shares.

Plea—That, after the accruing of the causes of action in the declaration mentioned, and before the making of the statement hereinafter mentioned, disputes and differences were existing between the plaintiff and the defendants touching and concerning divers dealings and transactions which had taken place between them, and touching certain matters of account arising out of those dealings and transactions; and that some of the said matters consisted of the several transactions in the declaration mentioned as to the rejection to purchase shares for the plaintiff, and others of which matters were the subject of an action then depending in this Court by the plaintiff against the defendants for damages claimed by the plaintiff in respect of certain other dealings between the plaintiff and the defendants,

Several matters in difference existing between the plaintiff and defendants, some of which were the subject of an action, it was agreed between them, that, in consideration that the defendants would consent to refer to arbitration the matters of the action, the plaintiff would accept such agreement in satisfaction of all damages sustained by him in respect of the other matters :—*Held*, that the agreement and its performance was a good bar to an action in respect of the last-mentioned matters.

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and certain other directions by the plaintiff to the defendants to purchase for the plaintiff certain other shares. Whereupon, the said disputes and differences then existing and the said action depending as aforesaid, it was agreed between the plaintiff and the defendants, that, in consideration that the defendants would consent to a Judge's order, by which the matters of the said action should be referred to the award of C. C., and that the defendants would agree to perform in all things his award, to be made of and concerning the matters so to be to him referred, so far as the same award should direct performance to be made by the defendants, the plaintiff should and would accept such agreement by the defendants in full satisfaction of all damages sustained by the plaintiff for and in respect of the several causes of action in the declaration in this action alleged.—Averments: That, in pursuance of the said agreement, a Judge's order in the said then depending action was consented to by the defendants, and was made by Sir T. J. Platt, Knight, one of the Barons of this Court, whereby, and by consent of the plaintiff and the defendants, the matters of the said then depending action were referred to the award of the said C. C., and whereby

bitration an action then pending cannot operate as a satisfaction or release of other causes of action not included in that reference. [*Parke*, B.—There is good consideration for the plaintiff's relinquishing those claims. The defendants consent to refer the action by a Judge's order, which may be enforced by attachment. *Martin*, B.—Suppose a person has two claims against another, and he says to the latter, "If you will consent to refer the one claim, I will give up the other," surely such an agreement would be binding.] An accord must appear to be advantageous to the party, otherwise it is no satisfaction: *Bac. Abridg.* s. "Accord and Satisfaction" (A.). This reference is not more advantageous to the plaintiff than it is to the defendants. It cannot be considered that either party obtains by more than he is justly entitled to in respect of the matters referred; consequently, there is nothing in satisfaction of the claims not included in the reference. [*Parke*, B.—The matters in question could not have been referred unless by consent of both parties. Then, as it appears that there was a binding agreement to refer, that is a satisfaction of the other claims.]

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Barstow appeared in support of the plea, but was not called upon to argue.

PER CURIAM (a).—There must be judgment for the defendants.

Judgment for the defendants.

(a) *Parke*, B., *Platt*, B., and *Martin*, B.

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To an action on a bill of exchange, drawn by B. upon, and accepted by, the defendant, and indorsed by B. to the plaintiff, the defendant pleaded, secondly, that, before the accepting of the bill, the defendant authorised B., in his own name, but on account of the defendant, to lay bets on horse races, and B., in pursuance of such authority, laid such bets and lost them: that B. afterwards voluntarily, and without the request of the defendant, paid the losses on such

DECLARATION on a bill of exchange, drawn by John Bennett upon and accepted by the defendant, and indorsed by J. Bennett to the plaintiff.

Second plea—That, before the accepting of the bill, the defendant authorised J. Bennett, in his J. Bennett's own name but on account of the defendant, to lay bets on horse races; and J. Bennett, in pursuance of such authority, laid bets on horse races, and lost them: And the defendant says, that J. Bennett afterwards, voluntarily, and without the request of the defendant, paid to the persons to whom he so lost such bets divers monies on account of the monies which he had so lost; and the defendant says, that the bets respectively were contracts by way of wagering; and the defendant says, that the said bill was afterwards so made and accepted as in the declaration mentioned, for and on account and towards repayment to J. Bennett of the monies which he had so paid; and the defendant says, that there never was any other consideration for the acceptance; and the defendant says, that there

bets; that the bets were wagering contracts; and that the defendant accepted the bill for repayment to B. of the monies which he had so paid; and that there was no other consideration for the acceptance and no consideration for the indorsement. Fifth plea: that, after the bill was due, and before B. indorsed it to the plaintiff, B., being indebted to the defendant in a sum exceeding the amount of the bill and interest, the defendant elected to set-off against the bill the debt so due to him, and gave notice of such his election to B.; and that B. indorsed the bill to the plaintiff after such notice. Sixth plea: that, after the bill was due and before B. indorsed it to the plaintiff, B. was indebted to the defendant in a sum exceeding the amount of the bill and interest; and B., in order to deprive the defendant of his right of set-off, did, in order to defraud the defendant and in collusion with the plaintiff, indorse the bill to the plaintiff, in order to enable the plaintiff to sue the defendant on the bill, without any consideration for the indorsement; and that the plaintiff sues merely as the agent of B., and in collusion with him. On demurrer to these pleas:—*Held*, that the second plea was bad; for the defendant, by giving the bill, acknowledged the money was paid on his account, and consequently there was sufficient consideration for the payment of the bill.

Held, also, that the fifth plea was bad, since the indorsee of an overdue bill does not take it subject to claims arising out of collateral matters, such as a set-off.

Held, also, that the sixth plea was bad, inasmuch as the indorsement of an overdue bill, under the circumstances stated in that plea, was no fraud.

was no consideration for the indorsement of the said bill to the plaintiff.

The third and fourth pleas were similar; the one alleging that the bill was indorsed to the plaintiff after it became due; the other, that the plaintiff at the time the bill was indorsed to him had notice of the premises.

Fifth plea—That, after the day on which the bill became due, and before J. Bennett indorsed it to the plaintiff, and while J. Bennett was the holder and owner of the bill, he then being indebted to the defendant in a sum exceeding the amount of the bill and the interest thereon from the time when the same became due, the defendant elected to set-off against the bill an equivalent part of the debt so due to the defendant from J. Bennett, and gave notice of such his election to J. Bennett; and the defendant says, that the said debt due from J. Bennett at the commencement of this suit was and is still due and unpaid to him; and the defendant says, that J. Bennett, so as in the declaration mentioned, indorsed the bill to the plaintiff after the day on which the bill became due, and after J. Bennett had such notice as aforesaid, and while the said debt was so due to the defendant from J. Bennett; and the defendant says, that he was not, at the time when he so elected to make the said set-off, or at any time afterwards, indebted to J. Bennett on any other account than on the bill; and the defendant says, that the plaintiff never, before J. Bennett had such notice, acquired or had any title or right to have the bill indorsed to him.

Sixth plea—That, after the day on which the bill became due, and before J. Bennett indorsed it to the plaintiff, and while J. Bennett was the holder and owner of the bill, he was indebted to the defendant in a sum exceeding the amount of the bill and the interest thereon from the time when the same became due; and whilst the said sum of money owing from J. Bennett to the defendant was due and unpaid, and after the bill became due, J. Bennett, in

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order to deprive the defendant of his right of set-off in respect of the aforesaid sum of money then owing from Bennett to the defendant, did, in order to defraud the defendant, and in collusion with the plaintiff, indorse the bill to the plaintiff, in order to enable the plaintiff to sue the defendant on the bill, without any consideration for said indorsement; and that the plaintiff sues in this manner merely as the agent of J. Bennett and in collusion with him; and that the sum of money so due as aforesaid from J. Bennett to the defendant hath not, nor hath any of it, been paid, but is still due. And the defendant pleads that he was not, at the time when the bill was so indorsed to the plaintiff, or at any other time afterwards, indebted to J. Bennett on any other account than on the bill.

Demurrers, and joinders therein.

Hance argued in support of the demurrers (December 1854).—The second, third, and fourth pleas are clearly bad. 8 & 9 Vict. c. 109, s. 18, merely renders wagering contracts incapable of being enforced; therefore, there was nothing illegal in Bennett's making the bets on account of the defendant; and the direction to make them contained an implied authority to pay them if lost. Then the defendant, by afterwards giving a bill for the amount so paid, in effect ratified the payment. [*Parke, B.*—Those pleas are certainly bad.] The fifth plea is also bad. It does not shew that the defendant had any right of set-off, since no action had been brought by Bennett against him. Moreover, the defendant was not bound to set-off the debt; and it is consistent with every allegation in the plea that the defendant might have recalled his election, and refused to set-off before the bill was indorsed to the plaintiff. [*Parke, B.*—The plea only states that the defendant elected to set-off the debt, and gave Bennett notice of his election; but this is of no avail, unless both parties agreed to it.] The sixth plea is bad, since it does not shew that the defendant

tended to set off the debt; and, consistently with every allegation in the plea, he may, in fact, have refused to do so. If, however, this is substantially Bennett's action, the defendant is not deprived of his right of set-off; for the indorsee of an overdue bill takes it subject to all the equities which attached to the bill in the hands of the holder when it became due: *Whitehead v. Walker* (a), *Burrough v. Moss* (b).

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J. Addison contra.—The second, third, and fourth pleas are good. There was no consideration for the acceptance or indorsement. By the 8 & 9 Vict. c. 109, s. 18, all wagering contracts are absolutely void. It is clear, therefore, that the winner could not have recovered the bet, and consequently the payment by Bennett was a payment in his own wrong. It is argued, that the defendant, by giving the bill, ratified the payment; but the doctrine of ratification only applies where the act is done by a person *as agent* and for the benefit of another. [*Parke, B.*—Do not the words “on account of him the defendant” mean “as his agent?” If the defendant, instead of giving a bill, had paid the money, could he have recovered it back? Then, having given a bill, that is a payment by anticipation.] If a person makes another his agent to purchase goods, that does not necessarily constitute him agent to pay for them. So here, Bennett might have been the defendant's agent to lay the bets, but not to pay his losses. [*Parke, B.*—If a person gives a bill for a debt which he is not bound in law to pay, as for instance on a guarantee not in writing, there is good consideration for the bill; it is, in truth, a payment at a future day. It has, indeed, been held, that a gift is not binding unless it be by deed, or the subject of the gift be actually delivered; but, if the point were *res nova*, it would perhaps be decided differently.]—

(a) 10 M. & W. 696.

(b) 10 B. & C. 558.

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Then, with respect to the fifth plea. The election by the defendant to set off the debt due to him from the drawer of the bill was, as between them, tantamount to payment. *Goodall v. Ray* (a) decided, that an indorsee of a promissory note, not overdue, but the amount of which is exceeded by a cross demand of the maker on the payee, having notice of such demand at the time of the indorsement, cannot recover against the maker advances made to the payee on the note subsequent to such notice, although the note is a distinct transaction between the original parties. [PARKES, B.—It cannot be said that a mere notice of set-off between the maker and acceptor of a bill before it is due will restrict the negotiability of the instrument. I pointed out, in *Whitehead v. Walker* (b), that there must be some mistake in the report of the case of *Goodall v. Ray*.] The law of set-off is founded on the doctrine of the civil law as to compensation: Pothier on "Obligations," p. 3, c. 4; and the same principles ought to govern its application. Unless a notice of election to set off a debt is binding, this inconvenience will ensue, that the party to whom the older debt is due must bring an action in order to prevent the operation of the statute of limitations; and, if he does so, he is met by the set-off, and must pay the costs of the unsuccessful action.—Then, with respect to the sixth plea, it shews that the drawer, acting in collusion with the plaintiff, fraudulently indorsed the bill, in order to deprive the defendant of his right of set-off. Such a transaction is within the spirit, if not within the letter, of the 13 Eliz. c. 5. In *Watkins v. Bensusan* (c), which was an action by indorsee against acceptor of a bill of exchange, the defendant pleaded, that, before and at the time of the indorsing of the bill by the drawer, he, the drawer, was indebted to the defendant in a sum of money exceeding the amount of the bill; and that, after the bill became due, in order to de-

(a) 4 Dowl. P. C. 76. (b) 10 M. & W. 696. (c) 9 M. & W. 422.

defendant of his right of set-off in respect of the fraudulently indorsed the bill, to enable the plain-
the defendant on the bill, and without any con-
a for the indorsement: and that was held to be
le plea. If the drawer had sued upon the bill, it
hat the defendant might have set off the debt;
situation is altered by the fraudulent transfer. At
s this is a good plea of set-off, within the prin-
he decision in *Carr v. Hinchliff* (a). [*Martin, B.*
s amounts to a plea of set-off, it ought to have
t of extinguishing the debt due from the drawer;
ill remains liable.]

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t, in reply, referred to *Isberg v. Bowden* (b).

z, B.—We entertain no doubt about any of the
ept the last. With respect to the three first, the
ce by the defendant of the bill of exchange for
aid by the drawer for bets made in his own name,
ality for the defendant, was a payment on account.
; that the defendant was not bound in law to repay
er; but, since he chose to give a bill, there is good
tion for its payment. If, instead of a bill, the de-
had given a sum in cash, or a bank note, it is
t he could not have recovered it back. It is, in
e same with a bill. There is money paid on the
it's account, which, by giving the bill, he acknow-
be a payment on his account, and that is ample
tion for the bill. Then, as to the fifth plea, notice
istence of a set-off does not take the case out of
ority of *Burrough v. Moss*, which decided that the
of an overdue bill does not take it subject to claims
out of collateral matters, such as a set-off, which is
onvenient mode of settling mutual accounts. The

(a) 4 B. & C. 547.

(b) 8 Exch. 852.

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only point upon which we entertain any doubt, is, whether the sixth plea shews an indorsement of the bill under circumstances of fraud as to give the defendant the right of set-off against the plaintiff as he had against the drawer of the bill. On that point we will take time to consider.

Cur. adv. v.

The judgment of the Court was now delivered by

PARKE, B.—The only question remaining for decision in this case is the sufficiency of the sixth plea. It is in these terms: (His Lordship read the plea, and proceeded to say) A plea, not substantially different from this, was held by the Court to be an issuable plea, in the case of *Watkins v. Bensusan* (a), where judgment had been signed for the defendant on a plea, after the defendant had given the usual undertaking to plead issuably. But in such cases it is not proper to allow judgment to be signed unless the plea is manifestly bad, which this plea is not, there certainly being a fair question about it. We think, upon full consideration, that the plea is bad.

It must be considered as entirely settled by the case of *Burroughs v. Moss* (b), that the indorsee of an overdue bill takes it subject to all the equities that attach to the bill itself in the hands of the holder when it was due; as, for instance, the payment or satisfaction of the bill to such holder, or where the title of such holder was on account to secure the balance of an account due, as seems to have been the case in *Collenridge v. Farquharson* (c). But the indorsee does not take it subject to claims arising on collateral matters, as the statutory right of set-off, which is merely a mode of preventing multiplicity of actions between the same parties.

(a) 9 M. & W. 422. (b) 10 B. & C. 538. (c) 1 Stark. N. P.

The doctrine laid down in *Burrough v. Moss* has been allowed in *Stein v. Yglesias* (a), and, we believe, never disputed. Notice of the existence of the set-off to the holder of the bill at the time it was due makes no difference, as was settled in *Whitehead v. Walker* (b), unless, indeed, express notice was given by the party liable, and evidence of acquiescence in it, such as would amount to proof of an agreement to set off by both parties, which would be a satisfaction of the bill independently of the date of set-off.

This being clearly settled, what is the effect of an indorsement of an overdue bill under the circumstances mentioned in the plea? These, though inaccurately stated, we think, amount to an averment, that both the indorser and taker, knowing that there was a debt due to the defendant, which would be set off if the action should be brought by the indorser against the defendant, in order to defeat the set-off, and fraudulently, so far as that was a fraud, and no further, agreed that the bill should be indorsed, and was therefore indorsed, without value, to the plaintiff.

Though the plaintiff gave no value, the bill by the indorser is transferred to him, and he has a right to sue on the bill if any intermediate party is a holder for value. There is, therefore, no defect in his title on that account. The only question then is, does the supposed fraud vitiate; and in what way? Is it really a fraud, though called so? We think it is no fraud.

The holder is under no legal obligation to allow the debt to be set off against the claim on the bill, unless he has entered into a contract to that effect with the defendant, which contract would create an equity in favour of the defendant attaching to an overdue bill. His power to circulate it is not restrained simply by the existence at the time of a debt of equal value, and his circulating it is, therefore,

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(a) 1 C. M. & R. 565.

(b) 10 M. & W. 696.

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no infringement of any existing right of the defendant. It is wholly contingent whether the defendant will have a debt due to him from the plaintiff when the bill is sued upon, and, if there be, whether the defendant will choose to plead a set-off. Till *then* the whole amount of the bill is due to the plaintiff; and if he indorses over the bill, though he must have known that the contingent right of set-off would be defeated, he clearly would give a good title. Does it become a fraud and defeat the title, if he actually intends to do, by indorsing it, what, under the circumstances, would be the necessary result of that act? and would it become so if he communicates that intention to the indorsee, and the latter agreed to assist him?

This, we think, is no fraud, and does not avoid the transaction. If it was a fraud, what would the consequences be? The transfer would be valid between the parties, and void only as against the party intended to be defrauded. That would not enable the defendant to set off against the plaintiff the debt due from another; for it would be against the words of the statute, which apply only to mutual debts between the defendant and plaintiff: Vide *Isberg v. Borden* (a). The cases in which a set-off has been allowed of debts not due from the plaintiff to the defendant are explained in the judgment in that case. They are cases where the real principal has permitted another to deal as owner, and cannot be permitted to interfere with allowing the same defence against the real principal which he would have had against the apparent one: see 8 Exch. 859, *Carr v. Hincliff* (b), *George v. Claggett* (c), as explained in *Tucker v. Tucker* (d). That is entirely different from the present case.

We think, for these reasons, that the sixth plea is bad.

Judgment for the plaintiff

(a) 8 Exch. 852.
 (b) 4 B. & C. 547.

(c) 7 T. R. 359.
 (d) 4 B. & Ad. 745.

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declaration stated, that, by a certain deed made and into by and between the plaintiff of the one part, the defendant of the other part, and sealed with the plaintiff's seal, and bearing date, &c., (amongst other things) the plaintiff covenanted with the defendant to lend to the defendant, his executors, &c., the sum of 15,000*l.* and security and at the times thereafter mentioned. 2ndly, that the plaintiff advanced all or any portion of 12,000*l.*, part of the 15,000*l.*, at any time or times within twelve calendar months from the date of the agreement, upon receiving from the defendant one calendar month's notice in writing, from time to time, of the sum required to be advanced: Provided, that, if the defendant shall provide security of sufficient value, he shall advance 4,000*l.*, part of the 12,000*l.*, on request. 3rdly, that the plaintiff shall advance to the defendant 8,000*l.*, being the residue of the 15,000*l.*, within three calendar months after the expiration of the nine months, upon receiving from the defendant one calendar month's notice in writing, of the sum required to be advanced. 4thly, that the term for which all or any portion of the 15,000*l.* is to be advanced, is three years from the date of the agreement, and is then to be repaid, if the plaintiff shall have then given six calendar months' notice that he requires the same to be repaid. 5thly, that, in consideration of the loan, the defendant covenants to pay the plaintiff, by way of premium, 1*l.* per cent. on the whole 15,000*l.*, from the date of the agreement up to the expiration of three years: *It is averred that the sum of money advanced under the agreement.* 6thly, that interest at the rate of 4*l.* per cent. per annum, shall be paid by the defendant to the plaintiff on all money advanced under the agreement, to commence to run from the day of each advance; *the said 4*l.* per cent. to be in addition to the 1*l.* per cent. before reserved.* 7thly, for securing any sum of money advanced, the plaintiff shall execute a mortgage on certain lands. 11thly, that, before any advance of money shall be made under the deed, the solicitor of the plaintiff shall investigate the title of the defendant to the lands used as the mortgage security, and such title shall be approved or rejected within a reasonable time after the delivery of the abstract of title: Provided, that the said solicitor shall have liberty to accept or reject such title at his own option; but, if the same is rejected, the advance shall have been made, then the agreement to be null and void. 13thly, that the defendant shall give the plaintiff one month's notice in writing of any sum of money to be advanced to him under the agreement, and he shall not take up the money at any time after the expiration of the notice, 4*l.* per cent. interest shall be payable by the defendant to the plaintiff in respect of the sum specified in such notice from the day such notice shall expire in the event of the defendant, at any time thereafter, requiring an equal or larger advance, or if he shall only require a smaller advance, then such interest as aforesaid, from the day of the advance, shall be payable on such smaller sum. 17thly, that, if the defendant at any time be desirous of paying off the advances made to him, or any portion of the same, it shall be lawful for him so to do, upon giving two calendar months' notice in writing to the plaintiff of his intention, and the plaintiff agrees to accept the same; but no interest or payments shall not in any way interfere with or annul the 5th article of the agreement:—*Held*, first, that the deed was not, upon the face of it, usurious, inasmuch as the interest of 1*l.* per cent. was not to be paid for forbearance of a loan, but as a consideration for the agreement to be ready to advance the 15,000*l.* in the manner required; secondly, that an advance of some money was not a condition precedent to the obligation of the plaintiff to lend the 15,000*l.* at 1*l.* per cent.:—*per Parke, B., and Martin, B.; Platt, B., dissentiente.* Also, that where money is lent at usurious interest on personal security, as well as on land, the contract is altogether void, and is not protected, as to the personal security, by the 2 & 3 Vict. c. 37.

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sum of 15,000*l.* upon certain terms and security, and a certain times stated in the said deed; and the defendant covenanted with the plaintiff to pay the plaintiff, his executors, &c., by way of premium, 1*l.* per cent. per annum on the sum of 15,000*l.*, from the date of that agreement up to the expiration of three years from that date, whatever might be the sum of money advanced under that agreement.—Averment, that the plaintiff advanced part of the said sum of 15,000*l.* to the defendant, and did all things necessary, and all things necessary were done, to entitle himself under the said deed to be paid by the defendant the said premium on the 15,000*l.*; that the time for the payment of the said premium for one year expired before the commencement of this suit.—Breach, nonpayment.

Pleas.—First, that the deed in the declaration mentioned was and is of the tenor and effect following :—Articles of agreement made and entered into this 22nd of February, 1853, between Thomas Fussell, of &c., of the one part, and Robert Daniel, of &c., of the other part. That the said Thomas Fussell, for himself, his executors, &c., covenants, promises, and agrees to advance and lend to the said R. Daniel, his executors, &c., the sum of 15,000*l.* upon

vance to the said R. Daniel, his executors, &c., the sum of 3000*l.*, being the residue of the 15,000*l.*, within three calendar months after the expiration of the above-mentioned nine months, upon receiving from the said R. Daniel, his executors, &c., one calendar month's notice in writing from time to time of the sum of money required to be advanced.

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4. That the term for which all or any portion of the said sum of 15,000*l.* is to be advanced is three years from the date of this agreement, and is then to be repaid, if the said T. Fussell, his executors, &c., shall have then given six calendar months notice, expiring at the end of the said three years, to the said R. Daniel, his executors, &c., that he the said T. Fussell, his executors, &c., requires the same to be repaid; and in the event of the said T. Fussell, his executors, &c., not giving such notice, then the repayment of the whole of the money and the interest hereinafter mentioned, then remaining unpaid from the said R. Daniel, his executors, &c., to the said T. Fussell, his executors, &c., in respect of the above-mentioned 15,000*l.*, shall be repaid upon either party giving six calendar months notice to the other of them for such repayment.

5. That, in consideration of this agreement, the said R. Daniel, for himself, his executors, &c., covenants, promises, and agrees to pay to the said T. Fussell, his executors, &c., by way of premium, 1*l.* per cent. per annum on the whole 15,000*l.*, from the date of this agreement up to the expiration of the three years above mentioned, whatever may be the sum of money advanced under this agreement.

6. That interest, at the rate of 4*l.* per cent. per annum, shall be paid by the said R. Daniel, his executors, &c., to the said T. Fussell, his executors, &c., on all sums of money advanced by the said T. Fussell, his executors, &c., to the said R. Daniel, his executors, &c., under this agreement, such interest to commence to run from the day or days of such advances; the said 4*l.* per cent. to be in addition to the 1*l.* per cent. before reserved.

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7. That, for securing any sum of money advanced by the said T. Fussell, his executors, &c., to the said R. Daniel, his executors, &c., he the said R. Daniel, his executors, &c., shall execute a mortgage by assignment to the said T. Fussell, his executors, &c., of all the leasehold land and completed houses fit for occupation and appurtenances, situate at or near the railway station at Wimbledon, in the county of Surrey, and which are delineated in the map, and coloured "green," and annexed hereto, and all his and their interest therein; and such mortgage shall contain all the terms and conditions contained in this agreement, and all the covenants usually contained in such a mortgage, with a power of sale for the said T. Fussell, his executors, &c., in default of payment by the said R. Daniel, his executors, &c., of all advances made to him or them under this agreement by the said T. Fussell, his executors, &c., at the time therein fixed for repayment.

11. That, before any advance of money shall be made under this agreement, the solicitor of the said T. Fussell shall investigate the title of the said R. Daniel, his executors, &c., to the leasehold land and completed houses fit for occupation, proposed as the mortgage security, at the

of the said T. Fussell, on behalf of the said T. Fussell, be at liberty to accept or reject such title at his own ; but if the same is so rejected and no advance shall been made, then this agreement to be null and

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That if the said R. Daniel, his executors, &c., shall the said T. Fussell, his executors, &c., one month's no-writing, except as aforesaid, of any sum of money to be ced to him under this agreement, and he or they shall ke up such money at the expiration of the notice, 4l. nt. per annum interest shall be payable by the said niel, his executors, &c., to the said T. Fussell, his exe- &c., in respect of the sum specified in such notice, he day that such notice shall expire, in the event of id R. Daniel, his executors, &c., at any time or times fter requiring an equal or larger advance to be made a or them; and if he or they shall only require a r advance afterwards, then such interest as aforesaid, the time aforesaid, shall be payable on such smaller

That if the said R. Daniel, his executors, &c., shall time be desirous of paying off the advances made to r them under this agreement, or any portion of them, l be lawful for him or them so to do, upon giving two lar months notice in writing to the said T. Fussell, ecutors, &c., of his or their intention; and the said T. ll, for himself, his executors, &c., agrees to accept the ; but such payment or payments shall not in any way ere with or annul the 5th article of this agreement. e plea then averred the identity of the parties, and l "that the plaintiff did not advance any part of the um of 15,000*l.* to the defendant under the said agree- as thereby stipulated."

ond plea—That the deed in the declaration mentioned nd is of the tenor and effect above in the first plea in behalf mentioned; and that the said deed was and is a

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corrupt and unlawful deed and agreement, whereby it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the plaintiff and the defendant, that the plaintiff should, upon and according to the terms and conditions in the said deed in that behalf mentioned and contained, lend and advance to the defendant such sums of money as in the said deed in that behalf mentioned, and forbear and give day and time for the payment thereof as in and by the said deed in that behalf mentioned; and that the defendant, for the loan and for the forbearing and giving day and time for the payment as aforesaid of such sums of money as should be lent upon and according to the said terms and conditions, should give and pay to the plaintiff more than lawful interest at the rate of 5*l.* for the forbearance of 100*l.* for a year, that is to say, such interest at the rate of 4*l.* per cent. per annum, as in and by the said deed in that behalf mentioned, and also the further sum and money in the said declaration mentioned, and which the defendant by the said deed agreed to pay by way of premium as therein mentioned, that is to say, the said 1*l.* per cent. per annum on the whole 15,000*l.* from the date of the said agreement up to the ex-

for the repayment of the said sum of 2350*l.*, from certain day, to wit, the 17th of March, 1853, until certain other day, to wit, the 17th of September, 1853, the defendant should pay to the plaintiff interest at the rate of 4*l.* for the forbearance of 100*l.* for a year;

that, over and above and in addition to such interest as last aforesaid, the defendant should also pay to the plaintiff, according to the said deed and upon the terms thereof in that behalf, the said further sum and money in the said deed mentioned, and which the defendant by the said deed agreed to pay by way of premium as therein mentioned. That such interest as last aforesaid, such further sum and money as last aforesaid, together, should be at the rate of 5*l.* for the forbearance of 100*l.* for a year, in conformity to the form of the statute &c.

Demurrer to first plea, and joinder therein.

Reply to second plea—That the deed declared on, and all the transactions mentioned in the second plea respectively took place after the making and passing of the Act of Parliament which was made and passed in the session of Parliament holden in the second and third years of the reign of our Sovereign Lady the Queen, intituled “An Act to amend and extend until the 1st day of January, 1852, the Provisions of an Act of the first year of her present Majesty for exempting certain Bills of Exchange and Promissory Notes from the operation of the Laws relating to Usury.”

Demurrer to replication, and joinder therein.

Bramwell argued for the plaintiff (December 4).—Both pleas are bad. The question raised by the second plea is, whether, upon the face of the deed itself, the contract is necessarily usurious. It is submitted that it is not. The plaintiff agrees to lend the defendant 15,000*l.*, at 4*l.* per cent., for three years certain: 12,000*l.* is to be advanced within nine months from the date of the agreement, upon

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receiving from the defendant, from time to time, a notice of the sum required; and the residue of the money is to be advanced within three months after the expiration of the nine months, provided the defendant gives a notice. Moreover, if the defendant provides sufficient security, he is entitled to 4000*l.* on request. It is therefore, that the plaintiff would be compelled to keep his money, so as to have it always ready when called for in consideration of his thus keeping the money "at the disposal of the defendant agrees to pay him 1*l.* per cent. for three months. Though the plaintiff is bound to lend, the defendant is bound to borrow any of the money; and it would be reasonable that the latter should be prevented from using his capital without receiving some remuneration. It is conceded, that if the whole or any part of the money was advanced, the interest agreed to be paid would not exceed 5*l.* per cent. on the sum advanced; but the 1*l.* per cent. is not a premium for the forbearance of the money advanced, but a compensation for the inconvenience of being obliged to keep the money always ready. If the defendant agreed to pay 10*l.* a day and 5*l.* per cent. for a year, which he might borrow within three years, such an arrangement would not be necessarily illegal. The 12 Ann. c. 16, only prohibits the taking of more than 5*l.* per cent. for the *forbearance of a loan*.—Then, with reference to the first plea, it is submitted that the advance of 4000*l.* of the 15,000*l.* was not a condition precedent to the payment of the 1*l.* per cent. premium. If it were so, the consequence would follow, that, though the plaintiff was obliged to be ready with his money, he would receive no compensation for this readiness, if the defendant refused to request an advance. That could never have been the intention of the parties. The words in clause 5, "the sum may be the sum of money advanced," do not mean that some money must at all events be advanced, but only that the premium was to be paid in consideration of the advance, and irrespective of any advances under it.

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The question intended to be raised by the replication to the second plea is, whether, assuming the contract to be usurious, the deed is invalidated. Courts of Equity have decided, that, where money is lent at more than 5*l.* per cent. interest on the security of land and also on personal security, the transaction is valid except as to the security on the land: *Lane v. Horlock* (a), *Ex parte Warrington* (b), *James v. Rice* (c). That, however, is at variance with the decision of the Court of Queen's Bench in *Hodgkinson v. Wyatt* (d), where an usurious contract was secured by bond, and also by an equitable mortgage of land; and it was held, that the contract was not protected by the 2 & 3 Vict. c. 37, s. 1, inasmuch as the proviso of that section prevents it from applying where a security on land is given.

Willes contra (December 5).—The question turns upon the validity of the pleas, and wholly depends upon the construction of the agreement. As to the first plea, the defendant submits, that the advance of some portion of the loan is a condition precedent to the plaintiff's right of action. It has been contended, that, upon the defendant's construction of the instrument, and it is conceded by him, if the smallest sum be advanced, the defendant's liability arises. But that construction is free from absurdity, since he has the sole power of deciding whether he will take a loan or not; and he may decide upon so doing, if he shall consider it to be worth his while to pay 450*l.* for a loan. Now, the 5th clause does not contain any stipulation that the sum of 150*l.* per annum shall be paid though no advance be made; but it simply states, "whatever may be the sum of money advanced under this agreement." The 6th clause puts the 4*l.* per cent. payable by way of interest on ad-

(a) 1 Drewry, 587.

(c) Kay, 231.

(b) 3 De G., Mac. & G. 159.

(d) 4 Q. B. 749.

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vances on the same footing as the 1*l*. per cent. payable by the preceding clause. The latter clause states, that the 4*l*. per cent. is "to be in addition to the 1*l*. per cent." The 11th clause affords a further argument that the 1*l*. per cent. is payable only in case of an advance; for it stipulates, that, before any advance shall be made, the defendant's title to the land &c. is to be investigated; and the clause empowers the plaintiff's solicitor to reject the title, and concludes by providing, that, if the title is rejected, and no advance has been made, the agreement shall be null and void. That stipulation clearly shews, that, in such event, the 5th clause must also fall. This view is confirmed by the 17th clause, which keeps the 5th clause alive in a particular event; and it is to be observed, that, for those events, in which it was intended that the 5th clause should not be affected, an express provision is to be found. The 13th clause was inserted for the purpose of providing against the plaintiff's incurring any loss, in the event of the defendant's failing to take up such advances as he might call for, by making the defendant liable to the payment of interest upon the call at the rate of 4*l*. per cent. It, therefore, appears that it could not have been intended that the defendant should have to pay so large a sum as 450*l*., except upon the condition of receiving an advance under the agreement.

The question arising upon the next plea is, whether the deed sets forth an usurious contract. This question, in reality, arises upon both pleas, although it is distinctly raised by the second. If it appear, either directly or indirectly, upon the face of a deed, that more than the legal amount of interest is payable, the instrument is void: *Marsh v. Martindale* (a). [*Parke, B.*—If upon the face of the deed it appears that the interest for the forbearance of the loan exceeds the legal rate, the deed is void; but, if

(a) 3 B. & P. 154.

that fact does not appear, the question whether the transaction is colourable only and to evade the statute, is one for the jury. *Martin*, B.—If the instrument admits of a doubtful construction, we must attribute that meaning to it which will make it legal. *Platt*, B.—Still, I think that such a construction ought to be adopted as will give full effect to the intention of the parties.] The instrument must receive a reasonable construction, but it cannot have two inconsistent meanings. If the defendant had received the whole amount, he would have had to pay more than the legal rate of interest. [*Parke*, B.—The question is, whether the 1*l.* per cent. is payable for the advance, or as a compensation for being ready with the money.] The plaintiff, in his declaration, has himself adopted the former view, for he alleges the debt to be payable for the loan of 15,000*l.* Now, the payment of the annual sum of 150*l.* has no reference to anything in the deed except the loan itself; and as already observed, such sum is connected with the loan by the language of the 6th clause. The statute of Anne relates to contracts as well as to actual loans. The deed therefore is void.

Bramwell in reply.—The consideration for the payment of the 1*l.* per cent. is the plaintiff's being prepared with the money, in case the defendant shall require it. This is an advantage to the defendant and a detriment to the plaintiff, and, therefore, forms the subject of a good consideration for the defendant's promise to pay the 1*l.* per cent. Now, although no advance be made or called for, still the plaintiff may have suffered a loss from not being able to put a large sum of money out at interest. If A. agrees with B. to give him 50*l.* in consideration that B. will advance 500*l.* on loan to C., that would be a good agreement between A. and B. That case is analogous to the present. In this view of the case, the payment of the 1*l.* per cent. is not usurious, and it is not necessary

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that any advance should have been made to entitle the plaintiff to claim the sum which he seeks to recover in this action.

Cur. adv. vult.

MARTIN, B.—These were demurrers to two pleas. The declaration states, that, by an agreement under seal, made between the plaintiff and the defendant, the plaintiff covenanted with the defendant to lend him 15,000*l.* upon certain terms and security, and at certain times, stated in the agreement, and the defendant covenanted to pay the plaintiff by way of premium 1*l.* per centum per annum on the sum of 15,000*l.* from the date of the agreement to the expiration of three years from such date, whatever might be the sum advanced; and the declaration alleged, that the plaintiff had advanced part of the sum of 15,000*l.*, and had done all things to entitle himself to be paid the said premium on the sum of 15,000*l.*; and that, although the time for the payment of the premium for one year had expired, the defendant had not paid it.

In the first plea, the defendant set out the agreement at length, and alleged that the plaintiff had not advanced any

receiving from the defendant one month's notice in writing, from time to time, of the sum required to be advanced, with proviso, that if the defendant should provide security of sufficient value, he was to have 4000*l.*, part of the 12,000*l.*, on request. The 3rd and 4th articles contained covenants as to the advance of the remaining 3000*l.* by the plaintiff within three months after the expiration of the nine months, upon notice being given of its being required, and to the repayment of the whole 15,000*l.* by the defendant at the expiration of three years from the date of the agreement, if required by the plaintiff so to do. The 5th article contained the covenant on which the declaration was made, and stated "*That, in consideration of this agreement, the defendant covenanted to pay to the plaintiff by way of premium 1*l.* per centum per annum on the whole 15,000*l.*, from the date of the agreement up to the expiration of three years, whatever might be the sum of money advanced under the agreement;*" and the plaintiff sought the present action to recover 150*l.*, the first year's premium, under this covenant. The 6th article provided, that interest at the rate of 4*l.* per cent. per annum should be paid by the defendant to the plaintiff on all sums of money advanced under the agreement, to commence to run from the day or days of such advance, the said 4*l.* per cent. to be in addition to the 1*l.* per cent. before reserved. The 7th article provided, that, for securing any sum of money advanced by the plaintiff to the defendant, the latter should execute a mortgage of certain lands therein mentioned. The 8th, 9th, and 10th articles contained nothing material to the present question. The 11th article provided, that, before any advance of money should be made under the agreement, the solicitor of the plaintiff should investigate the title of the defendant to the land to be mortgaged, and that an abstract thereof should be submitted to him by the defendant, which was to be approved or rejected within seven days after its delivery: *Provided*

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that the said solicitor should be at liberty to accept or reject such title at his own option; but if it were rejected, and no advance should have been made, that then the agreement should be null and void. The 12th article was not referred to by either learned counsel, and is not material. The 13th provided, that, if the defendant should give the plaintiff one month's notice of any sum of money to be advanced to him under the agreement, and he should not take up the money at the expiration of the notice, 4l. per cent. interest should be payable by the defendant to the plaintiff in respect of the sum specified in the notice from the day such notice expired, in the event of the defendant at any time thereafter requiring an equal or larger advance; and, if he should only require a smaller advance, then such interest should be paid from the day aforesaid on such smaller sum. The 14th, 15th, and 16th articles are not material. The 17th article provided, that, if the defendant should at any time be desirous of paying off the advances made to him, or any portion of them, it should be lawful for him to do so, upon giving two calendar months notice of his intention; and the plaintiff agreed to accept the same; but such payment or payments were not in any way to interfere with or annul the 5th article of the agreement. The residue of the deed does not seem material to the question in controversy between the parties.

It was admitted by the learned counsel for the plaintiff (and, indeed, it is obvious), that if any sum whatever, whether all or part only of the 15,000l., was advanced by the plaintiff to the defendant under the agreement, the payment stipulated to be made by the defendant to the plaintiff on the transaction would amount to more than 5l. per cent. per annum on the sum advanced; and it was also stated by him, that he did not mean to contend, upon the authority of certain cases decided in the Courts of equity, that the 7th article, as to the mortgage of the land, was

be void by the virtue of the statute 3 & 4 Will. 4, c. 98, 7; but that he was content to consider the decision of the Court of Queen's Bench to be the right exposition of the statute, namely, that such a stipulation attached upon the agreement, which was thereby rendered wholly void, the contract fall within the provisions of the statute of 12 Anne, st. 2, c. 16. But he contended, that the meaning of the agreement was, that the plaintiff from the time of making the agreement should, at the times therein mentioned, be in readiness to advance the 15,000*l.*, of which might be called for by the defendant within twelve calendar months from the date of the agreement; that the payment of the 1*l.* per centum premium, stipulated for in article 5, was a compensation for such readiness and being so prepared to advance and lend; that the Statute of Anne only prohibited the taking above the rate of 5*l.* for the forbearance of 100*l.* for a year; that it was true, that, if the payment contracted to be made by the defendant was a mere shift or contrivance in order to obtain more than 5*l.* per centum for the forbearance, the agreement was void; but it was admitted by the learned counsel for the defendant, that the agreement truly represented the agreement of the parties, and that the only question was upon its construction; and this is clearly so, for if the defendant had meant to insist that the 5th article, as to the 1*l.* per centum premium, was a shift or contrivance to obtain more than the legal rate of interest, it should have been so alleged in the plea, and it would have been a question for the jury, whether it was such shift or contrivance or not.

The real question upon the second plea therefore is, whether there is to be found on the face of the agreement anything necessarily usurious under the statute of Anne, at which by this statute renders the contract or agreement void, is the *contracting to take for money lent above the value of 5*l.* for the forbearance of 100*l.* for a year.*

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If this be done, the agreement is void; but in order to constitute a contract of usury, there must, as Lord Chief Justice *De Grey* said in *Murray v. Harding* (a), be a contract for, first, a loan, and secondly, that illegal interest is to be paid for *such loan*; and unless these two things concur, there is no usurious contract. Now, assume a man to apply to a banker, and state that in the course of the year following he would require his draught to be honoured to the extent of 10,000*l.*, and that the banker should stipulate, that, as a compensation to him for being always in readiness, and prepared to pay the 10,000*l.*, he should be paid 1*l.* per centum upon the entire sum, and 5*l.* per centum on the sum advanced from the time of the advance, and the jury found that this was the real and true bargain between the parties, and that the 1*l.* per cent. was really to be paid as compensation for being in readiness and prepared to pay the money when called for; I am of opinion that the contract would not be usurious, for this reason, *that more than 5*l.* per cent. was not contracted to be taken for the forbearance of 100*l.* for the year.* The jury negating shift and contrivance, and having found what was the real bargain, the contract would not, in my opinion, be usurious, although more than 5*l.* per cent. was obtained by the lender on the transaction. Again, suppose a man to contract to lend, say 1000*l.*, on demand, from time to time as it might be required, and that, for his being so always in readiness to advance the money, he should be paid a premium of 1*l.* per cent, but that no interest was to be paid on the money lent. I apprehend this agreement would be perfectly legal; and even if the premium were 10*l.* or 20*l.* per cent., or indeed any sum however large, that the agreement would not be void on its face. If the premiums exceeded the legal rate of interest, it would be a question for

(a) 2 W. Bla. 859.

the jury, whether it was not a shift or contrivance to evade the
 any laws; but upon the face of the agreement, there would
 nothing in it contrary to law. If then, an agreement to
 such a premium of 1*l*. per cent. would be legal, how can
 agreement become illegal by reason of the contract to pay
 legal rate of interest upon the money actually lent. The
 action then, upon the second plea, seems to me this:
 as the agreement, taken to be what on the face of it it
 seems to be, shew that the 1*l*. per cent. premium for the
 three years was to be the compensation for the liability of
 plaintiff to be called on by the defendant from time to
 time, during the year, for the advance of the 15,000*l*. The
 article states, that it is "in consideration of the agree-
 ment" that the premium of 1*l*. per cent. was to be
 paid. Now, the agreement of the plaintiff was, that he
 would advance the money as required, according to the
 stipulation in the agreement, according to article 6. The
 interest of 4*l*. per cent. was to be paid on the money
 advanced from the day of the advance, but it was *for the*
agreement that the premium of 1*l*. per cent. per annum on
 15,000*l*. for three years was to be paid. I therefore
 think, that, according to the true construction of the agree-
 ment, the premium of 1*l*. per cent. was not on the face of
 agreement itself contracted to be paid for the forbear-
 ance of the money lent, and that, therefore, it is not neces-
 sarily usurious. As it seems to me, the words of the agree-
 ment have not a double intendment; but, even if they had,
 then according to the ninth rule for the construction of
 words, given in Sheppard's Touchstone, p. 88, "If words
 have a double intendment, and the one standeth with law
 and the other is against law, they are to be taken in the
 sense which is agreeable to law." I therefore am of opinion
 that the second plea is bad.

I also think the first plea is bad. This, in truth, follows
 from what I have already said, if I am right in my view as
 to the construction of the agreement; for if, according to

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its true construction, the premium of the 1*l.* per cent. per annum on the 15,000*l.* was to be the compensation to be paid to the plaintiff for his being in readiness to advance the money when called on, it is obvious that his being called on or not is quite immaterial to the consideration for, and the right to receive, such compensation. The 11th article was much relied on, as shewing, that, if no part of the money was advanced, the premium should not be payable; but I do not think that it establishes such proposition, indeed, rather the contrary. *If the title had been rejected by the solicitor for the plaintiff, and no part of the money had been advanced*, then, by virtue of the 11th article, the premium was not payable, because, in such event, the agreement was to be null and void; but for anything that appears in the first plea, the title may have been accepted by the solicitor for the plaintiff, and the reason why no money was advanced may have been, that the defendant would not have any. In my opinion, therefore, the advance of the 15,000*l.* or part of it was not a condition precedent to the right to the payment of the premium of 1*l.* per cent. per annum, mentioned in article 5; and notwithstanding no money whatever was advanced, I think the premium

and the Act of the first year of the present reign for remitting bills and notes from the laws relating to usury. To this replication the defendant demurred.

The replication having been abandoned on the argument, the controversy was confined to the sufficiency of the two pleas.

By the agreement, which is dated on the 22nd of February, 1853, and made between Fussell of the first part, and Daniel of the other part, Fussell agreed to advance to Daniel 15,000*l.* upon the following terms and security, and at the following times. 2ndly, that Fussell should advance to Daniel all or any portion of 12,000*l.* at any time or times within nine calendar months from the 22nd of February, 1853, upon receiving from Daniel one calendar month's notice, in writing, of the sum of money required. Provided that, if Daniel should provide security of sufficient value, then he was to have 4,000*l.*, part of the 12,000*l.*, upon request; 3rdly, that Fussell should advance to Daniel 3,000*l.*, the residue of the 15,000*l.*, within three calendar months after the expiration of the nine months, upon receiving from Daniel one calendar month's notice; 4thly, that the term for which all or any portion of the 15,000*l.* was to be advanced, was three years from the 22nd of February, 1853, and should be repaid, if Fussell should have given six calendar months notice, expiring at the end of the three years; 5thly, that, in consideration of that agreement, Daniel covenanted to pay to Fussell, by way of premium, 1*l.* per centum per annum on the whole 15,000*l.* from the 22nd of February, 1853, up to the expiration of the three years, whatsoever might be the sum of money advanced under that agreement; 6thly, that interest, at the rate of 4*l.* per cent. per annum, should be paid by Daniel to Fussell on all sums of money advanced by Fussell to Daniel under that agreement, such interest to commence from the day or days of such advances, the said 4*l.* per cent. to be in addition to the 1*l.* per cent. before reserved; 7thly, that, for securing any sum of money

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advanced by Fussell to Daniel, Daniel should execute a mortgage, by assignment, of all the leasehold land and completed houses fit for occupation near the railway station at Wimbledon, with a power of sale; 9thly, that previous to any sum of money being advanced under the agreement or proposed mortgage, a valuation of the leasehold land should be made by Mr. Trimen of Adam-street in the Strand, surveyor, and such land should be valued in sections marked out on the plan annexed to the agreement; 11thly, that, before any advance of money should be made, Fussell's solicitor should investigate Daniel's title to the leasehold land and completed houses, and should be at liberty at his option to reject the title; and that, if the same should be so rejected and no advance should have been made, *the agreement to be null and void*; 12thly, that upon the approval of the title Fussell should, from time to time, advance to Daniel, upon proper notice as aforesaid, any portion of the sum of money agreed to be advanced, not exceeding three-fifths of the value of the land and houses estimated as aforesaid; 17thly, that, if Daniel should be desirous of paying off the advances made to him, it should be lawful for him so to do upon giving two calendar months notice, in writing, of his intention to Fussell, and Fussell agreed to accept the same, but such payment should not in any way interfere with or annul the 5th article of the agreement.

The sufficiency of the first plea depends on the construction of the 5th article. The agreement shews that the parties not only contemplated that some advances would be made within the first year; but, by the 2nd and 3rd articles provided for the contingency of the whole 15,000*l.* being required to be advanced within that period.

By the 11th article, Fussell was empowered to avoid the agreement before he had made any advance.

If the words "whatever might be the sum of money advanced under that agreement" had not been introduced

the 5th article, would it be reasonable to contend that Daniel would be entitled to demand 150*l.* yearly, for three years after he had exercised the power reserved to him by the 5th article.

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The introduction, however, of those words seems to me to show that the parties intended the liability to pay the 1*l.* interest to attach on making the first advance, and not on the 17th article.

If the contracting parties did not intend that the making of an advance should be a condition precedent, the 17th article was unnecessary. But, if they intended that it should be a condition, the 17th article might well prohibit, from the obligation which had once attached on the performance of the condition, Daniel should not be released by the repayment of the advances before the expiration of the three years. Construing, therefore, the 17th article with the aid of the 2nd, 3rd, 11th, and 17th articles, I think, that Fussell's making an advance was a condition precedent, and that consequently the first plea was sufficient bar.

The contracting parties appear, by their agreement, to have contemplated, that, if it was carried into execution in the manner most beneficial to Daniel, Daniel might receive 15,000*l.* forthwith, 8,000*l.* at the expiration of a month, and 15,000*l.* at the end of twelve months; that the money was lent until the 22nd of February, 1856; and that, during the whole three years, Daniel was to pay 1*l.* per cent. per annum on 15,000*l.* as a premium. Daniel, therefore, according to contract, could not escape paying 36*l.* 13*s.* 4*d.* at beyond 5*l.* per cent. on the advances.

Under the 12 Anne, statute 2, c. 16, all contracts for the lending of any money to be lent, whereby there shall be charged above 5*l.* per cent. per annum, shall be void.

Is the contract in question a contract of this description?

It was a contract for payment of money to be lent. Daniel's covenants to pay the premium of 1*l.* per cent. per annum on 15,000*l.* operated, under the terms of the contract,

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as a reservation of an amount exceeding 5*l.* per cent. of the sum to be lent, and, according to its context, was ~~in~~ consideration of Fussell's agreement. That agreement, described generally in the 1st article, was to *advance* ~~lend~~ to Daniel 15,000*l.* upon the terms and security of the times set forth in the following articles.

By those terms, and according to those times, the money was not to be in jeopardy, but to be repaid at all times, and the times of advancing them were so arranged, as to what is called the premium, to reserve, inevitably, more than 5*l.* per cent. per annum upon the money lent. The contract, therefore, appears to me to be, on the face of it, usurious.

Upon the whole, therefore, I am of opinion that the first pleas are good, and that the defendant is entitled to judgment.

PARKE, B.—I entirely concur in the opinion of my Brother *Martin* in this case, and in the reasons he has given for that opinion; and they are so fully and clearly expressed that I have very little to add to them.

The question raised by the second plea is, whether

rivance to conceal it, it should have been so pleaded, opinion of a jury taken upon it. But, as the second framed, the question is, whether, taking the deed to mean what it professes to mean, the sum mentioned in the declaration, viz. the first year's annuity of 150*l.*, of a reservation of more, or what may be more interest on the loan and forbearance of money than 5*l.* per cent. annum. Now this sum, which is stipulated for by Article 3 expressly stated to be in consideration, not of the 2*l.*, but of the *agreement* previously mentioned in Article 1, and that agreement is to advance and lend all or part of 15,000*l.* at certain times: 12,000*l.* within nine months on one month's notice, with a provision to have the sum advanced on request, on providing sufficient se-

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Article 5 provides, that, in consideration of that agreement the defendant is to pay, by way of premium, 1*l.* per cent. per annum on the whole 15,000*l.* from the date of the agreement up to the expiration of three years, whatever be the sum of money advanced under that agreement. The period of three years was that for which the loan was made by section 4, unless the plaintiff chose to contract for a longer period, by omitting to give six months to pay at the end of three years. If, however, the loan is continued beyond three years, the premium of 1*l.* per cent. would not be payable beyond that term.

Section 6, interest, at the rate of 4*l.* per cent. per annum was to be paid on all the sums actually advanced, and interest to commence to run from the days of advance, and said 4*l.* per cent. to be in addition to the 1*l.* per cent. before mentioned. The times from whence the payment of the 1*l.* per cent. and the 4*l.* per cent. are to begin are distinctly specified; in the former case from the date of the agreement, in the latter from that of the loan. The time for the payment of either is specified, than which they are both to be "*per annum.*" A promise to pay

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a certain sum per annum indicates, in the absence of any stipulation to the contrary, not only the rate, but the *time* of payment, viz. at the end of the year. The stipulation that 4*l.* per cent. is to be *additional* to the 1*l.* per cent., does not regulate the time of payment, making the 1*l.* per cent. on the 15,000*l.* payable at the same time as the 4*l.* per cent. on the then uncertain amount actually advanced; but only that the 4*l.* per cent., payable yearly at the end of the year on the sum advanced, should be in addition to, and independent of, the 1*l.* per cent. payable at the end of every year from the date of the agreement. Thus, on the face of the instrument, the 1*l.* per cent. on 15,000*l.* was a premium for what may be termed the covenant for the right of call of 15,000*l.* at stated times, which obliged the plaintiff to have that sum at command at those times, and, of course, prevented him from investing it in securities of a permanent character. This premium is equivalent to an annuity of 150*l.* a year, to be paid at the end of each year. The time of payment is fixed, and is entirely irrespective of the advances of money.

The 13th section, which provides for 4*l.* per cent. being payable on the money called for, from the time of the expiration of *the notice* to advance it, applies to the case of the money being actually ready in the hands of the plaintiff or his banker. There is nothing in the rest of the deed which is inconsistent with this view of the case; all the provisions may be easily reconciled with it, and with each other.

Section 11 provides for the investigating of the title of the plaintiff to the proposed security by the plaintiff's solicitor, which would probably take place before the expiration of the notice requiring the first advance, almost certainly within the year. If the title is rejected, then the whole agreement, including the stipulation to pay the 1*l.* per cent. at the end of the year, would be altogether void. The principal object of the advance required being clearly to enable the defendant to build houses upon a particular leasehold

the security for the advance, the whole transaction would fall away, be altogether void :
 now (as he had a right exceeding 4000*l.*, it of the sum bor-

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advance having
 whole or in part. In
 the payment is in no way to
 ment in the 5th Article, to pay the
 per annum.

whether, according to the terms of
 it would not be bound to advance
 during the three years (the whole
 advanced, or, if advanced, the part
 paid off) though after the first year.
 six and three months, in the first year,
 for the benefit of the plaintiff, that
 ed to advance at an earlier period.
 instruction, as I incline to think it is,
 of 1*l.* per cent. for three years would
 ed right of call. If the right of call
 then it would be an annuity for three
 years for the right of call for one. This
 except on the consideration of the
 upon a plea, stating it to be a shift
 more than 5*l.* per cent. : on that in-
 portant element.

instrument itself, I am clearly of
 sum of 1*l.* per cent. is not for forbear-
 loan of money, but a compensation
 be ready to advance money in the

is, whether an actual advance of any

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money is a condition precedent to the obligation to pay the 1*l.* per cent.

I have already shewn, that, in my opinion, this agreement is to pay 1*l.* at the end of the first year, quite irrespective of the payment of the sums advanced; and, therefore, I answer the question by saying, the advance of all or any of the money is not a condition precedent. Therefore, in my opinion, the first and second pleas are both bad in law.

If the deed had been usurious, I need not add, that I agree in the opinion, that it would not have been rendered valid by the statute 2 & 3 Vict. c. 37, this Court, and the Court of Queen's Bench also, not putting upon that statute the construction recently given to it by the Lord Justices, in *Ex parte Warrington* (a), and adopted by Vice-Chancellor *Kindersley* (b), and we believe by Vice-Chancellor *Page Wood* (c). Indeed, Mr. *Bramwell* gave up this point on the argument. This difference of opinion is practically of little consequence, as all the statutes against usury are now repealed by the 17 & 18 Vict. c. 90, and it is probable that the question will hardly ever arise.

Judgment for the plaintiff

- (a) 3 De G., Mac. & G. 159. (b) *Lane v. Horlock*, 1 Drewry, 587.
(c) *James v. Rice*, Kay, 231.

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THE declaration was on a bill of exchange for 55*l.* 9*s.* 1*d.*, payable three months after date, drawn by one R. Ewen upon the defendant, and accepted by him, and indorsed by Ewen to the plaintiffs.

Plea—"That the defendant accepted the said bill for the accommodation of the said Robert Ewen, and that there was no value or consideration for such acceptance, for the payment by the defendant of any part of the amount of the said bill; and that the said R. Ewen indorsed the said bill and other bills to the plaintiffs as a security for the repayment to the plaintiffs of a small sum of money, to wit, 30*l.*, and no more, then advanced by the plaintiffs to him, and interest thereon, and upon and for no other value or consideration; and that after action the plaintiffs' claim on the said bill was satisfied and discharged by payment to them, by the acceptor of one of the other bills, of the sum of money so advanced and all interest thereon; and that from thence hitherto the plaintiffs have held and still hold the said bill in the declaration mentioned, without value or consideration."

Demurrer and joinder—One of the grounds of demurrer to the plea was, that it shewed no bar to the further maintenance of the action, as, notwithstanding anything therein contained, the plaintiffs were entitled to continue the action for the recovery at least of their costs.

Unthank in support of the demurrer.—The case of *Goodwin v. Cremer* (a) is a direct authority that the plea is bad.

Without value or consideration:—*Held*, on demurrer, that the plea was bad, both on the ground that it did not answer the damages in the action; and also, that the payment relied on as made by a stranger was not alleged to have been made for and on account of the debt, and to have been ratified by the defendant.

(a) 22 L. J., Q. B., 30.

To an action by indorsee against acceptor of a bill of exchange for 55*l.* the defendant pleaded, that he accepted the bill for the accommodation of the drawer, and without consideration; that the drawer indorsed it with other bills to the plaintiffs as a security for the repayment of 30*l.* then advanced by them to the drawer, and that after action the plaintiffs' claim on the bill was satisfied and discharged by payment to them, by the acceptor of one of the other bills, of the sum of money so advanced, and all interest thereon; and that from thence hitherto the plaintiffs held and still hold the bill declared on, with-

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That was an action by the second indorsee against the acceptor of a bill of exchange, to which the defendant pleaded *puis darrein continuance*, that when the bill became due the first indorsee paid to the plaintiff, who was then the holder of the bill and entitled to receive the proceeds of it, and the plaintiff then accepted and received from him, a certain sum, "being the full amount of the said bill and all interest due thereon, in full satisfaction and discharge of the said bill, and of all monies due and payable on account and in respect thereof." The Court held the plea bad; and Lord *Campbell*, C. J., said, "The payment is not alleged to have been received in respect of the damages, or in respect of this pending action against the acceptor, and yet it is sought to stop the action, and to prevent the holder of the bill from recovering his costs in the action from the acceptor." That case was decided in the year 1852; and the only question is, whether the plea is aided by the 22nd and 23rd of the Pleading Rules of Hilary Term, 1853. Rule 22 directs that "a plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defences arising before the commencement of the action, provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading such first-mentioned plea." Rule 23 directs, that, "when a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea," &c. [*Parke*, B.—Those rules do not apply to this case, for this plea is clearly bad. The payment here relied upon was not made and accepted in full satisfaction and discharge of the debt in this action. Formerly, pleas in bar, and in bar of the further maintenance of the action, were not allowed to be pleaded together. The rules in question were made to allow this, and to give the plaintiff the power to withdraw

f he should think the pleas cannot be resisted, and the rules give him his costs up to that time.] This plea does not allege that the payment was made upon account of the bill in which the action is brought. [Parke, B.—The plea, therefore, is more vicious than that in *Goodwin v. Cremer*; or if the plea were amended, so as to make it answer the damages, it would still be bad.]—He was then stopped by the Court.

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Prentice contra.—The plea is good in substance. *Jones Broadhurst* (a) shews that payment to the creditor by a stranger may be a good accord and satisfaction of a debt. His plea states that the plaintiffs' claim upon the bill was satisfied by the payment in question. This is a good defence on general demurrer, though open to objection on special demurrer: *Bousfield v. Edge* (b). In *Henry v. Earl* (c), it was held, that payment of a sum of money in full satisfaction of all the causes of action in the declaration mentioned being pleaded to a portion of the debt only, and not to the damages and costs, was, nevertheless, a good answer to that amount to which it was pleaded. The plaintiff, therefore, could have signed judgment for his costs. [Parke, B.—The plea is directed to the whole cause of action. In *Henry v. Earl* the plea was directed to a particular and specific sum, and not to the damages and costs appertaining to that sum.] The defendant will lose the advantage of the payment of the 30*l*. [Parke, B.—When it becomes a question of damages that payment will be allowed.]

Unthank was not called upon to reply.

PARKE, B.—The plea is bad. The case of *Goodwin v. Cremer* is directly in point; and I do not find fault with that decision. The point raised, but not decided, in *Jones v.*

(a) 9 C. B. 173.

(b) 1 Exch. 89.

(c) 8 M. & W. 223.

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Broadhurst, has since been before the Court of Common Pleas in a case (a) where it was laid down, that a payment to the creditor by a stranger must be *for and on account* of the debt, and that such payment must be subsequently ratified by the debtor. The plea here is even more faulty than that in *Goodwin v. Cremer*, as it does not bring the payment within the rule last mentioned. Our judgment therefore must be for the plaintiffs.

PLATT, B., and MARTIN, B., concurred.

Judgment for the plaintiffs (b).

(a) *Bolshaw v. Bush*, 11 C. B. 191. (b) See *Simpson v. Eggington*, post.

Dec. 5. THE GOVERNOR, GUARDIANS, &c., OF THE POOR OF
KINGSTON-UPON-HULL v. PETCH.

The plaintiffs,
guardians of

THIS was a special case, stated by an order of a Judge,
for the opinion of this Court. The action was brought

, for the use of the poor of Kingston-upon-Hull, issued advertisement, of which the following is a copy—

The Corporation of the Governor and Guardians of Poor in Kingston-upon-Hull will, on Wednesday the 10th of December instant, receive tenders for the supply of workhouse, for three months, for butcher's meat, from ten to fifty stone (more or less per week) of good ox beef parts to be delivered in each week are the thick end of the flanks and the upper and under buttocks, a golister and lower end of the chine with the neck end, and a piece of the same ox, without bone. Also, from five to ten stone (more or less per week) of good wether mutton parts to consist of legs and necks.

Sealed tenders, accompanied by samples of such articles will admit thereof, to be forwarded to the clerk of the Corporation, before six o'clock of the evening of Tuesday, 20th instant.

P.S. *All contractors will have to sign a written contract after acceptance of tender.*

“(By order) ROBERT WELLS,
“ Clerk to the Corporation.”

On the 21st of December, the plaintiffs sent to several attorneys, and, amongst others, to the defendant, the following letter.

“ Sir,—I am instructed by the Governor and Guardians of the Poor, to inform you that they have postponed their reception of tenders, to supply this house with beef and mutton, on the terms of their prior advertisement, for the quarter ending the 21st of March, 1854, until Tuesday next, at six o'clock in the evening, at the workhouse, when they will be ready to receive any tender from you.

“ I am, &c. ROBERT WELLS, Clerk.”

On Tuesday, the 27th of December, the defendant sent

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to the plaintiffs a written tender, signed by him, which was as follows :—

“ To the Governor and Guardians of the Poor of the parishes of Holy Trinity and St. Mary.

“ A tender for meat.

“ 14, Whitefriar's lane, Hull, Dec. 17.

“ Gentlemen,—I propose to supply your house with meat according to advertisement, for the ensuing three months at 6*d.* per pound.

“ Yours, respectfully,

“ HENRY PETCH.”

On the 28th of December, the defendant's tender was accepted; and a memorandum of such acceptance was written on the tender, and the common seal of the corporation was affixed to it. The acceptance of the defendant's tender was notified to him in the following letter :—

“ Sir,—I am directed by the Governor and Guardians of the Poor of this town, to inform you, that they have appointed you butcher for this corporation, for the quarter ending the 28th of March next.

“ I am, &c. JOHN VICKERS, Master.”

On a subsequent part of the same day, the defendant wrote to the plaintiffs to inform them, that he declined to supply them with meat.

The question for the opinion of the Court was, whether the plaintiffs were enabled to recover in this action for the refusal by the defendant to supply the workhouse with meat. If the Court should be of opinion that the action was maintainable, judgment was to be entered for the plaintiffs; but if they should be of a contrary opinion, then judgment of *nolle prosequi* was to be entered for the defendant.

Hugh Hill for the plaintiffs.—The question is, whether

is any binding contract between these parties. The defendant will contend that there was a mere proposal on which he withdrew. The plaintiffs, on the other hand, submit that the contract was complete, and the defendant is bound by it. [*Parke, B.*—The advertisement expressly states, that there is to be a written contract signed by the contractor, after the acceptance of the

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The parties, no doubt, contemplated that a variety of important matters would have to be settled as to the price of the meat, and the particular times at which it was to be delivered, and various other matters of a similar nature which were not provided for by the handbill. The acceptance of the tender did not complete the contract.]

It is, no doubt, that difficulty in the plaintiffs' way. It would seem from the dates, that it was intended that the tender, when accepted, should be acted on immediately.

[*Parke, B.*—There are many cases, where, though there is an acceptance by parol of a proposal for a contract, yet preliminary matters are to be settled prior to the contract being concluded. *Martin, B.*, referred to *Cranford v. Marshall (a)*.]

King, contra, was not called on to argue.

Parke, B.—The defendant is entitled to judgment. It was clearly the intention of the parties that there should be no binding engagement until a written contract had been entered into. The tender, though accepted, was not a contract.

Parke, B., and *Martin, B.*, concurred.

Judgment for the defendant (*b*).

¹ Exch. 395.

(b) See *Vollans v. Fletcher*, 1 Exch. 20.

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JESSOPP v. LUTWYCHE.

To a declaration for money paid and on accounts stated, the defendant pleaded, first, that the causes of action accrued after the passing of the 8 & 9 Vict. c. 109, under and by virtue of certain contracts made between plaintiff and defendant, by way of gaming upon the market price of shares; and secondly, that the causes of action accrued to the plaintiff as a broker in the City of London, about the purchasing and selling for the defendant in the City of London of shares; and that the plaintiff was not duly licensed in pursuance of the statute:—*Held*, on demurrer, that the pleas were bad.

THE declaration was for money paid by the plaintiff for the defendant at his request, and for money found to be due from the defendant to the plaintiff on accounts stated between them.

Second plea—"That the causes of action in the declaration mentioned accrued to the plaintiff after the passing of the 8 & 9 Vict. c. 109, intitled 'An Act to amend the law concerning games and wagers;' and that the said causes of action accrued to the plaintiff under and by virtue of certain contracts or agreements made after the passing of the said Act by and between the plaintiff and defendant, and which said contracts and agreements were by way of gaming and wagering, contrary to the said statute and in violation thereof, to wit, certain contracts or agreements, by way of wager upon the market price on certain days of certain shares, to wit, called the English and Australian Copper Smelting Company, and to pay the difference thereon, contrary to the said statute, whereby the same were and are null and void."

Third plea—"That the causes of action in the declaration mentioned accrued to the plaintiff as a broker in the City of London, to wit, a sharebroker, in and about the purchasing and selling for and on account of the defendant in the City of London of divers interests and shares in a certain mining company, to wit, called the English and Australian Copper Smelting Company; and that the plaintiff was not at the time of the said purchasing or selling or bargaining as aforesaid, or at any or either of the said times, nor at the time of the accruing of the said causes of action, or any or either of them, within the City of London as aforesaid, a broker, duly licensed, authorised,

empowered to act or practise as a broker in the premises;
any of them, within the City of London."

Demurrer and joinder.

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Manisty in support of the demurrer.—The second plea
ad; for although a contract by way of gaming may be
| still it does not follow that an agreement to pay
| money lost upon such a contract is illegal and void. It is
| consistent with this plea that the plaintiff was requested,
| : the transaction was concluded, to pay the money to
| third party for the defendant. [*Martin*, B. —The case
| *Wulds v. Harrison* (a) virtually decides that this plea is
|

the third plea is bad for the same reason. And, moreover,
not stated, nor does it appear by the plea, that the
money paid and alleged to be due upon the accounts stated
claimed by the plaintiff as broker. The plaintiff can
be defeated by shewing that his demand consists of
sum to remuneration for his services as a broker. *Pid-*
v. *Burslem* (b) is an express authority upon this
it.—He was then stopped by the Court.

Feedham contra.—As to the second plea: if the ille-
contract mentioned in it were purely a collateral mat-
the plea could not be supported. But it is alleged
the claim accrued "under and by virtue of" that
contract. The plaintiff, therefore, was a party to it.
v. *Wike*, B.—The plea does not negative the fact of a third
party having won the money, and that the defendant re-
sisted the plaintiff to pay the amount over to him. The
|, therefore, is consistent with a state of facts which
| enable the plaintiff to recover.]

The third plea is good. *Cope v. Rowlands* (c), is an autho-
| that an unlicensed broker cannot recover remuneration

(a) Ante, p. 572.

(b) 3 Exch. 465.

(c) 2 M. & W. 149.

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for commission in buying and selling stock; and if the act is illegal and the plaintiff is *particeps criminis*, he cannot recover: *Clayton v. Dilly* (a), *De Begnis v. Armistead* (b). The case of *Petrie v. Hannay* (c), however, has a contrary aspect. [Parke, B.—*Pidgeon v. Burslem* cannot be surmounted. The statute relating to brokers only precludes them for recovering remuneration for their services as such. Martin, B.—This plea is open to the same objection as the preceding plea.]

Manisty was not called upon to reply.

PARKE, B.—Both pleas are bad. *Pidgeon v. Burslem* is precisely in point. It is consistent with the pleas that the defendant requested the plaintiff to pay over the money for him to a third party, and that in fact it was so paid; in which case the defendant has no defence.

PLATT, B., and MARTIN, B., concurred.

Judgment for the plaintiff

(a) 4 Taunt. 165. (b) 10 Bing. 107. (c) 3 T. R. 418.

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SEMPLE v. H. CORNEWALL.

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declaration stated, that, in consideration the plaintiff count the joint and several promissory note of the ; and one H. I. H. Cornwall for 700*l.*, and dated of July, 1853, and payable three months after ie plaintiff or his order, the defendant and the said Cornnewall jointly and severally promised the plain- e event of the said note not being paid at matur- y to the plaintiff interest on the amount thereof at f 1*s.* in the pound per month, payable monthly in the first payment to made on the 12th of Octo- , should the said note not be then paid; and that the said note came to maturity on the said 12th r and was not paid at maturity, and no part as paid before or on the day on which in the such nonpayment the sixth monthly payment of n advance became payable according to the said and the whole of the amount of the said note unpaid on and after the last-mentioned day, psed before this action, and although the plaintiff

A declara- tion stated, that, in considera- tion the plain- tiff would dis- count the joint and pro- missory note for 700*l.*, paya- ble three months after date, of the defendant and one H. S., the defendant pro- mised the plaintiff, in the event of the note not being paid at ma- turity, to pay him interest on the amount of the note, at the rate of 1*s.* in the pound per month : The declara- tion then al- leged, that the plaintiff did then dis-

aid note, and that it was not paid at maturity, and still remained unpaid, a breach the non-payment by the defendant of certain of the monthly in- Plea : that it was corruptly agreed between the plaintiff, the defendant, and the plaintiff should discount the note, and as the proceeds of such discount- : to the defendant 595*l.* only, and that the plaintiff should receive for such amount of the note on its arriving at maturity, and that the plaintiff should day of payment of the amount of the note for an indefinite period, to com- the note should become due; and that, for the forbearing of payment of the , the defendant should pay the plaintiff 105*l.*, being the difference between 05*l.*, three months after the advance, and for the forbearing of payment on the so made up, such sum of 1*s.* in the pound per month, on the sum of 700*l.*, nthly, as in the declaration mentioned. The plea then alleged, that, to secure and interest thereon, the defendant agreed to confess, and did confess, a judg- t himself to the plaintiff for 1400*l.*, and that the said judgment was duly regis- Court of Common Pleas, in the mode provided for by the statute in order : lands, tenements, and hereditaments of the defendant :—*Held*, that the plea e agreement relied upon not being usurious; and that, as the transaction was promissory note, the whole transaction was rendered legal by the 3 & 4 Will. 4,

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did, in a reasonable time after the making of the defendant's and the said H. I. H. Cornewall's said promise, and before the said note became due, discount the said note and did all things necessary to entitle himself to be paid interest according to the said promise: yet the defendant has not nor has the said H. I. H. Cornewall paid 140*l.*, being the amount of the 3rd, 4th, 5th, and 6th monthly payments which became payable before this suit.

Plea—That the said agreement was made by and between the plaintiff and the defendant corruptly and against the form of the statute in such case made and provided, in this, to wit, that by such agreement it was and is agreed by and between the parties aforesaid, that the plaintiff should on the 9th of July, 1853, discount the said note for 700*l.*, and as the proceeds of such discounting, lend and advance to the defendant a certain sum of money, to wit, 595*l.* and no more, and should receive for such advance the amount of the said note three months afterwards, when the same became due and payable, to wit, on the 12th of October, 1853; and that the plaintiff should further forbear and give day of payment of the said sum of 700*l.* for an indefinite period of time to commence from such 12th day of October, 1853; and that, for the forbearing and giving such day of payment on the said sum of 595*l.*, the defendant should pay to the plaintiff the sum of 105*l.*, being the difference between 700*l.* and 595*l.*, in three months after the said advance, and for the forbearing and giving day of payment on the said sum of 700*l.* so made up as aforesaid, such sum of 1*s.* in the pound per month on the said sum of 700*l.*, payable monthly as in the declaration mentioned; and that, to secure the said loan and interest thereon, the defendant should confess a judgment against himself to the plaintiff, for the amount of 1,400*l.*, in the Court of Exchequer, at Westminster, a memorandum or minute of which said judgment, containing the name and usual place of abode and the title or profes-

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on of the defendant, together with all other such matters and things as were and are, by the statute in such case made and provided, required, in order to affect the lands, tenements, and hereditaments of the defendant, should be taken with the senior Master of the Court of Common Pleas, Westminster, in order that, by such means, the plaintiff should have and hold a security for the said advance and interest on the lands, tenements, and hereditaments of the defendant.—The plea then alleged, that the agreement herein mentioned was forthwith carried into effect by the plaintiff and the defendant in all respects; and that the defendant did then confess such judgment to the plaintiff as aforesaid; and that the plaintiff did then forthwith sign such judgment as aforesaid against the defendant, and did give such memorandum, as aforesaid, of the judgment to the said Master of the Court of Common Pleas, at Westminster, and thereby the defendant's lands, tenements, and hereditaments became and were affected thereby, according to the form and effect of the statute in such case made and provided; and the plaintiff thereby then had and obtained a security on the defendant's lands, tenements, and hereditaments for the said loan and interest, which lands, tenements, and hereditaments of the defendant, in England, so affected and charged by such memorandum, as aforesaid, were then amply sufficient in value to satisfy such charge and lien; and further, that the said sum of 105*l.* for the forbearance of the said sum of 595*l.* for the said period of three months, as aforesaid, and also the said sum of 1*l.* in the pound per month, so agreed to be paid by the defendant to the plaintiff, as aforesaid, for such loan and forbearance of the said sum of 700*l.*, so made up as aforesaid, do, and each of them doth, exceed the rate of 5*l.* for the forbearing of 100*l.* for a year, contrary to the statute in such case &c.

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Replication, that the said agreement was made after the passing of the 2 & 3 Vict. c. 37.

Demurrer and joinder.

Phipson in support of the demurrer.—If the loan had been simpliciter on the promissory note mentioned in the declaration, it could not have been contended that the instrument was usurious; for the case of *Nixon v. Phillips*(a) decides that a bill of exchange or promissory note, payable at three months, at a rate of interest exceeding 5*l.* per cent. per annum, is valid, although secured by a mortgage on land. The question, therefore, is, whether the 3 & 4 Will. 4, c. 98, s. 7, has legalised this transaction, there being also a security on land. [*Parke, B.*—The transaction is based upon the note.] It is not altogether an independent contract. [*Parke, B.*—In *Lane v. Horlock*(b), it was held that a loan upon a discount of bills, the payment of which is secured by a warrant of attorney authorising the entering up of immediate judgment, is not a loan or forbearance of money upon the security of lands, so as to make the transaction usurious. The language of the 3 & 4 Will. 4, c. 98, s. 7, is very large. It enacts “that no bill of exchange or promiss-

est, in Great Britain and Ireland respectively, for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture," &c. That legalises the whole transaction, for the loan is upon the note, and the land is merely a collateral security.] The statute, no doubt, may be taken to legalise the bill or note itself, but the question is, whether simply because a bill or note is the basis of the transaction, it is thereby valid. [*Parke*, B.—That is the opinion of the Court.]

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Willes, contra, was not called upon to argue.

PER CURIAM (a).—There must be judgment for the plaintiff

Judgment for the plaintiff (b),

(a) *Parke*, B., *Platt*, B., and
Martin, B.

(b) See *Fussell v. Daniel*, ante,
 p. 581, and the 17 & 18 Vict. c.90.

Exchequer Reports.

HILARY TERM, 18 VICT.

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Jan. 13.

GIBSON and Another v. STURGE and Another.

A vessel was chartered to carry a cargo of corn from Odessa to Gloucester, for freight payable at a certain rate per quarter. 2664 quarters were shipped at Odessa, and the master signed bills of lading in the usual form, and which contained a memorandum, "quantity and quality unknown." The vessel arrived at Gloucester with the cargo of corn, when it was measured at the Queen's Beam, and found to contain 2785½ quarters.

In the course of the voyage a portion of the corn, from some unknown cause, had become heated and damaged, whereby its bulk was increased:—*Held*, that freight was payable on the quantity of corn shipped, and not on its measurement at the port of discharge:—*Per Pollock, C. B., Alderson, B., and Platt, B.—Martin, B., dissentiente.*

THE declaration stated that the defendants were indebted to the plaintiffs for money payable for freight for the conveyance by the plaintiffs for the defendants, at their request, of goods in the ship "Prompt."

Pleas: first, never indebted; secondly, payment.

At the trial, before *Martin, B.*, at the London Sittings after last Hilary Term, it appeared that the action was brought to recover the sum of 44*l.* 11*s.* 5*d.*, claimed by the plaintiffs as the balance of freight, due from the defendants as consignees of a cargo of wheat from Odessa to Gloucester, under the following charterparty:—

"Memorandum for Charter.

"North Shields, May 10, 1852.

"It is this day mutually agreed between Messrs. Gibson & Sawn, of North Shields, owners of the good ship or vessel called the 'Prompt,' *Æ* 1, and coppered, of North Shields, the burthen of 356 tons register admeasurement, or thereabouts, whereof Edward K. Robson is master, now

the Tyne, and Mr. John Swan, of Constantinople, merchant: That the said ship being tight, staunch, &c., shall, with all convenient speed, after discharging her outward cargo of cinders in Spain, sail and proceed to Constantinople and thence as ordered to Odessa, Kertche, or a safe port in the sea of Azof, or so near thereunto as she may safely get, and there load of the factors of the said freighter all and complete cargo of tallow, wheat, seed, or other ware goods, or grain, at the option of the freighter, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to a safe port in the United Kingdom, or a safe port on the continent between Havre and Hamburg (both inclusive), or so near thereunto as she may safely get, calling at Cork or Limerick at master's option for orders, which are to be given by return of post, in reply to the captain's letter to the charterer, or lay days to commence, and deliver the cargo on being paid freight as follows, namely,—

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From Odessa or Kertche.	To the United Kingdom.		
For Tallow .	£2 7s. 6d.	{ Per Ton of 20 Cwt. gross .	{ To a safe port between Havre and Hamburg, as above-named, £10 per cent. extra.

her stowage goods, seed, or grain, if any, in proportion, according to the London Baltic printed rates, and 10s. additional if loaded at Taganrog (or a safe port in the sea of Azof), being in full of all port charges and pilotage as customary: the freighter engages to provide the necessary expenses for damage. The cargo to be brought to and taken on alongside at charterer's expense and risk; the ship's master and crew to render all customary assistance in towing lighters, &c. (The act of God, the Queen's enemies,

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fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage, always excepted.) One half of such freight to be paid in cash on unloading and right delivery of the cargo, and the remainder by an approved bill on London at three months date, or in cash less discount, at the merchant's option," &c. (Then followed a stipulation as to demurrage, &c.)

The vessel loaded 3,700 chetwerts (which was equivalent to 2,664 quarters) of wheat at Odessa, where the master signed bills of lading in the following form:—

"Shipped in good order and well conditioned by Messrs. Zarifi Brothers & Co. in and upon the good ship or vessel called the 'Prompt,' whereof Edward K. Robson is master, and now riding at anchor at Odessa, and bound for the United Kingdom, 3,700 chetwerts of wheat in bulk, to be delivered in the like good order and condition at the port of destination (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted) unto Messrs. Zarifi Brothers & Co. or their

The defendants paid to the plaintiffs 978*l.* 8*s.*, being the freight upon 2,664 quarters, but refused to pay the balance now claimed, on the ground that the heated corn had increased the bulk, and that they were only liable to pay for the invoice quantity shipped at Odessa. The corn was afterwards dried, when it was found to weigh less than the quantity shipped.

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The learned Judge ruled that the defendants were liable to pay freight for the quantity of corn delivered; and a verdict was found for the plaintiffs for the amount claimed, leave being reserved to the defendants to move to enter a nonsuit.

Bramwell, in last Easter Term, obtained a rule nisi accordingly; against which

Watson and *C. Pollock* shewed cause in last Trinity Term (June 9).—The question is, whether, when a cargo of wheat or any other commodity, on its arrival at the port of destination, has increased in bulk, freight is payable on the quantity shipped or on that delivered. There is no direct authority on the subject, and consequently the case must be decided on principle. It is submitted that freight is payable on the quantity delivered. The master has no means of measuring the quantity shipped, and for his own security he signs bills of lading, "quantity and quality unknown." But on the arrival of every vessel in this country, its cargo is measured or weighed by the custom house authorities at the Queen's beam, so that the shipowner may readily ascertain the amount of freight due. By the terms of this charterparty, the cargo is to be delivered, on being paid freight for tallow 2*l.* 7*s.* 6*d.* per ton of 20 cwt. If then, in the course of a warm voyage, the tallow decreased in weight from evaporation, freight would only be payable on the quantity actually delivered; and it is reasonable that the same rule should apply if the tallow increased in weight. The charterparty goes on to say, "other stowage goods,

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seed, or grain, if any, in proportion, according to the London Baltic printed rates," so that the same mode of calculating the freight should be extended to them. Some kind of goods, as, for instance, sponge, will necessarily expand during a long voyage, and therefore a space must be left in the vessel for that purpose. In the converse case, viz. of goods decreased in bulk, the law is thus stated in Abbott on shipping, p. 430, 8th ed. :—"In our West India trade the freight of sugar and molasses is regulated by the weight of the casks at the port of delivery here, which in fact is, in every instance, less than the weight at the time of the shipment; and therefore the loss of freight occasioned by the leakage necessarily falls upon the owners of the ship by the nature of the contract." [Alderson, B.—Where the quantity delivered is less than that shipped, it is certain that what was shipped has been carried the whole voyage, but not so where the quantity delivered is greater than that shipped.] As a general rule, the consignee must pay freight for that which has occupied room in the ship *at any time*. Thus, freight is payable on damaged goods, from whatever cause the damage may have arisen, and even though the goods are so damaged as to be of no value; *Lutwidge v. Grey* (a).

erte si le fret ne lui étoit pas payé en entier" (c). In *Mol-
ly De Jure Maritimo*, Bk. 2, Chap. IV, Sect. 14, it is said,
If freight be taken for one hundred tons of wine, and
renty of them leak out, so that there is not above eight
ches from the buge upwards, yet the freight becomes
ne." Where it is otherwise it is because, by the foreign
w, the merchant may abandon. Thus it is laid down in
bbott on Shipping, p. 428, 8th ed., citing Guidon, Ch. 7,
rt 11:—"If goods contained in casks, as wine, oil, olives,
lasses, and others of the like sort, have leaked to such an
tent that the casks are empty, or nearly empty, the mer-
ant may abandon them for the freight before they are
aded." In the case of slaves or animals which die on the
yage, Roccus adverts to these distinctions—"First, if the
arterparty express that freight shall be paid for so many
en or animals as shall be put on board, and any of them
ie before the ship reaches the destined port, freight is due, be-
ause the contract is fulfilled," &c.; secondly, "where freight
promised *for conveying* men or animals to a *certain*
lace, and before the ship's arrival at that place any of
hem die, freight is not payable for those that are dead,
ecause the contract is not complete by which freight was
romised for their actual conveyance," &c. "The third case
where it does not appear precisely for what freight was to
e paid, whether for taking the animals into the ship, or for
eir actual conveyance. In this case, freight must be paid, if
hey are merely taken on board, although the animals or
aves should die before the ship reaches the destined port,"
tc.: Roccus, notes 76, 77, 78. Freight is not payable for a
child born during the voyage, because it does not occupy
much room, or make use of articles necessary for the voy-
age: Roccus, note 79. That case, therefore, affords no
analogy. The true principle being, that freight is payable
for that which has occupied the ship at any time, it follows

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(c) *Commentaire sur l'Ordonnance de la Marine*, liv. 3, tit. 3, art. 8.

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that, in the absence of a special contract, freight is due, not on the quantity shipped, but on the quantity delivered.

Bramwell and *Selge* in support of the rule.—The question depends on the contract between the charterer and the shipowner; and it is submitted, that the true meaning of the contract is, that freight shall be paid on the quantity of wheat shipped. The defendant is charged as assignee of the bill of lading, by which he is to pay freight "as per charterparty." Freight is payable in respect of the receipt, carriage, and delivery of the cargo. The identical number of grains which were put on board were carried, but on the voyage they imbibed a certain quantity of moisture. If it be held that freight is payable for the room occupied by the increased bulk, a shipowner would have a direct interest in damaging a cargo. It would be impolitic to lay down a rule which would cause the duty of the shipowner to conflict with his interest, and tempt him to commit fraud. There is no reason why the measurement at the Queen's beam should be adopted. Corn might be consigned to a place where no Customs regulations required its measurement. Or suppose the corn was unshipped, and was not measured until some time afterwards, when it had become dry, would freight be payable in respect of an increased bulk which had ceased to exist? Here the entire vessel is chartered, and it is as if the parties had agreed that freight should be paid for that mass of corn put on board of it. There is no greater difficulty in ascertaining the quantity at the port of shipment than at the port of delivery. [*Pollock*, C. B.—Suppose that shortly before the vessel was moored in the dock a quantity of water got into it, so that the corn was deluged, could it be contended that the corn ought then to be measured, and freight paid upon the water which had spoilt it?] Unless the bill of lading had contained the exception as to "damages and accidents of the seas," the shipowner would have been liable for the

done to the corn; and could he in that case have freight on the increased bulk arising from his contract? If not, he cannot claim it now, for the cargo was introduced, not for the purpose of giving the charterer right, but of relieving him from liability. As to the converse case, Valin and Pothier differ as to the construction of the French Ordinance: Valin puts it into casks, as wine, oil, honey, or other commodities, which have leaked out to such an extent that the casks are nearly empty, the merchant may abandon the freight" (a). Valin considers that this article gives effect to abandonment to the merchant in the case of happening as well from the fault of the casks as from the perils of the sea. On the other hand, Pothier holds this opinion, and contends that the article of abandonment is to be confined to the case of leakage occurring from the peril of the sea, in which case he considers the merchant to be bound to pay the freight on the commodity, viz. the contents of the casks, to be absorbed, as much as if they had been washed overboard: *Abbott on Shipping*, p. 430, 8th ed. In *Lutwidge v. Grey* (b), a merchant, who under the circumstances might have rejected the goods, accepted them at a place short of the destination, and therefore was bound to pay the freight. Here the only quantity which has been carried on the voyage is that which was shipped; and upon its loss alone the freight ought to be computed.

Cur. adv. vult.

Learned Judges having differed in opinion, now deliver their judgments seriatim.

IN, B.—This is an action to recover 44*l.* 11*s.* 5*d.*, alleged to be due for the freight of a cargo of

French Ordin. liv. 3, tit. 3, art. 26, Code de Com. art. 310.

(b) *Abbott on Shipping*, p. 438, 8th edit.

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wheat brought from Odessa to Gloucester in the ship "Prompt," and there delivered to and accepted by the defendants under a bill of lading, dated the 28th of September, 1852. The bill of lading was in the ordinary English form, and was signed by the master, and was in the material parts as follows, viz. "Shipped, &c., in and upon the 'Prompt,' whereof &c., and now riding at anchor at Odessa, and bound for the United Kingdom, 3,700 chetwerts of wheat in bulk, to be delivered, &c., at the port of destination (the act of God, &c., and every other dangers of the seas, &c., excepted) unto Messrs. Z. & Co. or their assigns, paying freight for the goods as per charterparty." And by a memorandum on the bill of lading, the quantity and quality were declared to be unknown to the master. The provision in the charterparty as to the freight of wheat was, that it was to be according to the London Baltic printed rates, which is a certain well-known rate per quarter.

The ship, with the cargo, arrived at Gloucester, and the wheat was there accepted by the defendants as the assignees of, and under, the bill of lading, and was measured under their inspection and that of the Custom-house authorities.

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or the increased bulk of the wheat, or, in other words, increased number of quarters, arose from the bad on of the wheat when shipped, from the heat almost rily arising in a cargo of wheat on so long a voyage hipment of water, by a peril of the sea excepted in the bill of lading, or from bad or defective a, or careless and negligent conduct of the master w in the course of the voyage. Upon these points as no evidence, and therefore it was wholly un- whether the increased bulk of the wheat arose from for which the plaintiffs were responsible, or from for which they were not. A verdict was entered for intiffs, leave being given to the defendants to move to nonsuit. A rule was granted for this purpose, and seen argued before us.

very extraordinary that this question has not before but it seems that it has not. No case was cited ; directly upon it, and we are now to decide it ally for the first time.

first question is, whether there be any contract con- in the bill of lading upon the point in dispute; if e, there is an end of the matter, and the payment e made according to it. The freight is to be paid *he wheat shipped and the wheat delivered*. The must be delivered to entitle the plaintiffs to the , but the plaintiffs have delivered the entire quantity at which was shipped. So far as appeared at the very grain of wheat shipped on board at Odessa was ed to the defendants at Gloucester. It was increased : and a part of it damaged by heating, but the entire y shipped was delivered. It was argued, that the hich was delivered beyond the bulk shipped was and not wheat; but there was no evidence that any ver came in contact with the wheat at all; and I there are causes which increase the size of grain han contact with water. However this may be, in gment, the measurement for the purpose of freight,

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whenever made, ought to be of the grains of wheat actually exist. The valuable part of the grain of which that which produces the flour; but in the grain there husk, and, I believe, always a certain quantity of moisture or water which can only be removed by kiln or artificial drying, and this argument, if well founded, would equally include the measurement at Odessa, for there can be no doubt that a certain quantity of damp or moisture was then in combination with the grains of wheat, and to some extent increased its bulk.

It is clear, according to the general law on the subject, that the circumstance of the wheat being damaged does not at all affect the right of the plaintiffs to freight. It has been decided, that when the entire quantity of wheat delivered, the shipowner was entitled to the full freight notwithstanding it was proved that the goods conveyed had been damaged by the negligence of the captain and crew, and that the remedy for the merchant was by a separate action for negligence: *Davidson v. Gwynne* (a). I have bestowed upon the bill of lading the most careful consideration in my power, and it really amounts to this, that the captain certified that he had received on board at Odessa a cargo of wheat in bulk of the precise quantity of 3,700 chetwerts, which he was ignorant, but which was denominated in the bill of lading as 3,700 chetwerts, which was to be delivered by him at the port of destination (subject to certain exceptions) to the consignee, he paying a certain freight in English quarter for its conveyance. I cannot say for myself that there is contained in this document any material defect or retract upon the point now in dispute, and so far as respects it the question in my opinion may be deemed open. If I were to hazard a conjecture upon its construction, I should feel inclined to say that the number of quarters measured upon delivery was that upon which freight was to be paid; but the wording is so ambiguous that I do not feel to express a decided opinion to this effect.

(a) 12 East, 381.

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In my judgment, therefore, the point in controversy must be decided upon the general grounds which the common law, in the absence of all contract and authority upon the subject, prescribes for the determination of such questions. The first and principal one is, what is most just and reasonable between the parties? A second is, what is the rule in other cases having an analogy and similitude to the one in question? A third is, what is the most convenient judicial rule upon the subject, having a view to the real substantial interest of all parties concerned?

Now, first, what is most just and reasonable between the parties? In the present case there is no evidence whatever as to how the heating and increased bulk of the wheat arose; it may have arisen from the bad and defective quality of the wheat when shipped. The captain expressly disclaimed himself to be ignorant of its quality, and declined responsibility upon this head. It may be that the wheat was injured by reason of the negligence of the captain and crew, other than the mere perils of the sea, but there is no evidence of it, and for the present purpose it seems to me that the question ought to be considered irrespective of blame attaching to any one; in such case the shipowner has afforded ship room and capacity for the bulk of the cargo, which was delivered at Gloucester. The space in his ship was occupied by the cargo which was brought there for the benefit of the defendants; and the freight being to be paid according to measurement, it seems to me just and reasonable that the measurement of the largest space occupied by the cargo conveyed during the voyage should be the test for ascertaining the payment of freight to be made. The measurement at Gloucester, therefore, seems to me to be a more just and reasonable one for ascertaining the freight between the parties than the measurement at Odessa.

Secondly. What is the rule in cases having analogy and similitude to the one in question? The wheat was no doubt

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in part damaged on the voyage; but whether the plaintiff be responsible for that damage is left entirely uncertain. It is possible that they are; but it is equally possible that they are not. There is no doubt, however, that the entire cargo shipped was delivered, although in a damaged state as to part; and I apprehend the true rule upon the subject is, that the right and true delivery of goods upon which freight is made payable by the terms of a bill of lading, is the delivery of the entire quantity shipped and accepted, irrespective of its condition; and, notwithstanding the goods may have been damaged by the fault of the master and crew, the entire freight must be paid, and the remedy of the merchant is by a cross action. The law upon the subject is discussed in Abbott on Shipping, p. 426, and the following pages, 8th ed.; and what I have above stated appears to be the result. The analogy therefore seems to be, that the actual state of things at the completion of the voyage, wholly irrespective of damage and its consequences, should govern the question of freight.

Thirdly. What is the most convenient, practical rule upon the subject? The wheat in question, as was proved at the trial, was shipped on board the vessel whilst in quarantine in an open roadstead out of barges, and it is notorious that in many foreign parts this is the usual mode of shipment. Under such circumstances it is practically impossible to measure a cargo of grain: there is neither time, nor, generally speaking, a sufficient number of men competent to do it. The bill of lading signed by the captain expressly stated that he was ignorant whether the quantity shipped was equal to the quantity mentioned in the bill of lading, and in substance declared that he would not be bound by it. Now the cargo, upon the arrival in this country, was by law to be measured under the supervision of the Custom-house authorities. It, in truth and fact, measured more quarters than were specified in the bill of lading, and the question now under consideration is, whether, in the

of all authority and contract upon the subject, the measurement at Odessa or the measurement in England is the more convenient practical measurement in order to pay the freight. It was plainly the intention of all parties that delivery was to be made immediately upon the arrival of the ship at her port of destination; and the payment of the freight was to be made on such delivery. The plaintiff had a lien for his freight, and was entitled to hold on to the wheat until it was paid. The delivery and payment were to be contemporaneous acts. The wheat, as delivered at Gloucester (the port of delivery), amounted to a number of quarters upon which the plaintiff claims the freight, and he was really and in truth ignorant of its measurement at Odessa. What is the more convenient rule in such a state of things? Is the delivery to be delayed until a communication be made to Odessa, in order to ascertain whether the quantity stated in the bill of lading is correct; and is the delivery of the goods and the payment of the freight to be held in suspense until an answer is received to the communication? Such a state of things seems to me to be most injurious to all parties; and, in my judgment, by much the most convenient practical rule is that payment of freight should be made upon the measurement in England.

I am quite aware that this rule would hold out a temptation to shipmasters to wet such a cargo as wheat, and to increase its bulk; but this would be a most distinct fraud, and would clearly subject both the captain and the shipowner to an action for damages. I do not think it will ever occur, and I cannot think its possible occurrence will justify what I consider would be a most inconvenient rule when the freight is to be paid either on measurement or weight, and the shipowner and his agents are present at what they are at the port of shipment, that, in the absence of any express contract upon the subject, the freight is to be paid according to the measurement or weight.

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weight at the port of shipment, when it varies from that at the port of delivery. But the temptation to dishonesty is not all on one side. Assume a cargo to arrive in this country when the article was low in the market, and it was desired by a dishonest or shuffling consignee to delay the payment of the freight, he would object that the Custom House measurement or weight was incorrect, and that he must ascertain what was the measurement or weight at the port of loading abroad. The shipowner might tender the cargo and bring an action for his freight; but the defendant would, as of course, in such case be entitled to a commission to examine witnesses at the port of shipment; a delay of payment for several months would be then at once secured, and the probability is, that, in the great majority of cases of foreign ships, the unfortunate owner would be driven to accept whatever terms the consignee might think fit to impose on him.

In Abbott on Shipping, p. 430, 8th ed., it is stated, that, in the West India trade, the freight of sugar and molasses is regulated by the weight of the casks at the port of delivery, which, it is said, is in every instance less than the weight at the time of shipment, and the loss therefore always falls upon the shipowner. This is what is not unusually called the converse of the present case.

In my opinion, therefore, in the absence of contract upon the subject, and considering what is most just and reasonable, what is most analogous to cases of a similar kind, and what is the most convenient practical rule upon the subject, and the most beneficial to all parties interested, the measurement at the port of delivery affords a test for the ascertainment of freight preferable to that of measurement at the port of loading. If this be found inconvenient in any particular classes of cargo, a few words inserted in the bill of lading would effectually remedy it.

I would not have differed from the other members of the Court, had I not a very strong opinion upon the point;

certainly entertain a strong feeling that the judgment so pronounced will lead to mischievous and important consequences to the commerce of this country, and that an alteration be made in the ordinary form of charters and bills of lading, which of itself would be a considerable evil.

In my opinion the plaintiff is entitled to judgment, and ought to be discharged.

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J. B.—Freight has been well defined to be the price for the carriage of goods from the port of loading to the port of discharge. In ordinary cases it does not become payable before the completion of the voyage and delivery of the goods to their destination. From the nature of the transaction, the goods shipped are the subject of the carriage, and for the carriage of them from the port of shipment to the port of discharge the freight is payable. In conformity with these propositions they are described in the bill of lading as being packed in good order and condition on board the particular vessel, lying in a particular place, and bound on a particular voyage from thence to a specified port, and as being received on that voyage and delivered in like good condition at such port. They must be shipped at the port of departure and thence carried the whole way to the port of discharge; and unless they are carried from the port of departure to the end of the voyage the freight is not

It is suggested, that the computation of the freight should be by other measurement than one taken at the port of destination, which would impose hardship on the owners, who might, in the case of their receiving the cargo from boats in a roadstead, be unable to ascertain the number of quarters taken.

It seems, however, to me, to be the duty of the court to ascertain, at the time of loading, the quantity received, and the difficulty in his so doing appears to be

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purely imaginary, as it can hardly be supposed that the number of cubic feet which his vessel is competent to afford to the stowage of grain could be unknown to him, so that he could not ascertain the cubic bulk of such a commodity as grain when stowed.

The difficulty, however, never could arise in the present case; for, upon the facts raising the question for the Court's decision, the quantity shipped was known, and the owners contended, that, although they received and during the *whole* voyage have carried that quantity only, yet, as by reason of the moisture having in the course of that voyage so operated upon the grain as to increase its bulk, they are entitled to profit by that increase, and claim freight according to the capacity of the cargo at the port of discharge; or, in other words, to be paid freight not only for the grain shipped, but also for the water which they have allowed to incorporate with it, and the increased bulk resulting from that incorporation. Such a mode of payment would plainly offer a premium to negligence in the treatment of a cargo of this description during the voyage.

In this case the bulk received at the port of loading was the only bulk carried during the whole of the voyage;

tipulations, the freight is due for that quantity which has been carried for the whole voyage, as I think it is, it seems to me to follow as a necessary consequence, that the less amount alone falls within that category. It is true, perhaps, that the same individual grains are carried throughout, but they measure more in bulk on their arrival than at their loading. The case seems to me to be in close analogy to that of the pregnant females mentioned in *Folloy*, Bk. 2, Chap. 4, s. 8, where no freight is payable for the infants of whom they are delivered during the voyage. And, again, where freight is contracted for the transporting of animals, and some die during the voyage, the freight is payable only for those which arrive safe. And, again, where goods, as in the case of molasses, have wasted in bulk during the voyage, freight is payable for the amount which survives. These are admitted cases. Now, all these cases may only, as it seems to me, be reasonably explained on the principle, that, in such cases, the freight is to be calculated and paid on that amount only which is put on board, carried throughout the whole voyage, and delivered at the end to the merchant.

It is said, that this will be found inconvenient in practice. If it be so, it may easily be obviated by an express stipulation. But the rule as it stands obviates an evil on the other side—that of suffering the owner of the ship to gain by the want of care on the part of his master and crew; for it may be that corn shipped dry on board may, by the negligent or careless admission of water, be deteriorated in quality and increased in bulk, so that, whilst there is a loss from the deterioration to the merchant, the shipowner may, from the increased bulk, have a benefit. This would be wrong as well as inconvenient; and the rule proposed by my learned Brother would be open to this consequence. For these reasons I cannot agree in the conclusion at which he has arrived.

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the highest respect. But, on the best consideration given to the subject in dispute between the parties, I am of opinion that the rule ought to be made absolute, that the defendant has paid all that the plaintiff is entitled to demand; and that the claim to be paid for the increased bulk, which the wheat acquired during the voyage, cannot be sustained.

The remote cause of the increased bulk of the wheat does not appear; but there is little doubt about the cause. It is clear, that there was not a real increase of commodity; it was an apparent increase only. The cause (unknown) the wheat, during the voyage, during the last two or three days of the voyage, imbibed a quantity of water, which made it swell in space; and the shipowner claims to be paid for the water imbibed during the voyage, (and possibly for two or three days of it,) as well as for the wheat that was on board and carried the whole voyage. I have decided, that the cause of this is one for which the shipowner is not responsible; but, on the other hand, I have decided, that (whatever it was) it was not on the defendant that was responsible; in this respect the parties stand on an equal footing; and I agree with my Brother that our decision ought to be founded on the principle of not imputing in this respect any blame to either party.

The first question is—Is this claim supported by the evidence?

freight would not be payable; so, I think, if delivered, but not shipped, freight would not be payable; and this agrees with the decisions, (very few in number, and none of them precisely in point), which are to be found in the books on the subject of increase or decrease (during the voyage) of the article to be carried. I agree, that the bulk or weight, as appearing at the port of destination, may be *prima facie* the criterion of the freight to be paid; but, when it is proved that *that* test is fallacious and untrue, and that the real quantity shipped was a different and smaller quantity, (as the jury in this case have actually found,) then I think that the freight ought to be calculated upon the true quantity shipped; and in my judgment the captain's ignorance of the true quantity, (as expressed in the bill of lading,) cannot entitle him to charge freight according to a false estimate: whether the actual quantity be stated and admitted in the bill of lading, or the contents are stated to be unknown, appears to me to make no difference as to the principle which ought to govern our decision. But it does appear to me to be contrary to the principles of natural justice, that the shipowner should acquire a right to demand more freight, and the owner of the goods become liable to pay more freight, in consequence of a circumstance which is an injury to the goods, and which has occurred to them while they were in the care, custody, and keeping of the shipowner, or those who represent him; over the causes of which the owner of the goods has *no* control, but some of the possible causes of which are considerably, or entirely, under the control of the captain and the crew.

I apprehend no one can entertain any doubt, that, if the water which has caused the apparant increase were capable of separation from the wheat originally shipped, the defendant would be entitled to reject it, and to accept and pay freight for the wheat freed from this injurious addition. In the case of a cargo of sponge shipped dry, and to be paid for by weight at the end of the voyage, the consignee might

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surely squeeze out all the water imbibed during the voyage, (if any), and pay for sponge only. It seems to me, that the right to demand, and the liability to pay, additional freight, in a case where the goods have received a damaging (but only an apparent) increase, cannot turn on the mere difficulty of separation. If it can be accurately known and ascertained what ought to be separated, though the separation cannot be made, it is known what ought to be deducted from the claim of freight, and the deduction (which is possible) ought to be made. Here the measure of the wheat shipped was known and has been proved,—all beyond that is water; and though the water cannot be separated, the amount of freight charged for the water can be ascertained, and, I think, ought to be deducted from the claim founded on the mere measurement at the port of discharge or delivery; and I think it is no answer to this, to say, that in many cases the quantity shipped would be unknown, or would be ascertained with difficulty. Deal with those cases as justice or convenience may require, but do not exclude the truth, where accessible, because you cannot always obtain it. If the experience of commerce had discovered that the measurement at the port of destination was the most

possible, duty and interest should not be opposed to each other. I think it would be dangerous and mischievous to give a shipowner a right to charge more freight for an injurious alteration in the commodity carried, which he or his agents have always the means in their own hands of producing.

I am, therefore, of opinion, that freight for this increase of bulk cannot be claimed under the bill of lading; and I think it cannot be claimed on any principle recognised by the common law. I think there is no contract, express or implied, to pay it.

Rule absolute.

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STEELE v. HADDOCK and Others.

Jan. 16.

THIS was an application for leave to plead, with other matters, an equitable defence. The declaration was in trover for goods; and the defendant proposed to plead, first, not guilty; secondly, that the goods were not the plaintiff's; and, thirdly, an equitable defence—That the plaintiff was the owner of certain chemical works; that the goods in question were stock in trade and materials on the premises; that the defendants agreed to purchase the chemical works from the plaintiff, and the goods in question were to be included in the property sold; that certain brokers were employed to make the contract; that they made it by bought and sold notes, and by mistake of the brokers, the notes were so worded as not to include the stock in trade and materials which were intended to be included by both the plaintiff and the defendants; that possession of the chemical works, including the goods in question, has been delivered

In trover for goods, the defendant was allowed to plead, with other pleas, the following equitable defence:—That the plaintiff was the owner of certain chemical works, that the goods in question were stock in trade and materials on the premises; that the defendants agreed to purchase the chemical works from the plaintiff, and the goods in question were to be

included in the property sold; that certain brokers were employed to make the contract, and that they made it by bought and sold notes; and, by mistake of the brokers, the notes were so worded as not to include the stock in trade and materials, which were intended to be included by both the plaintiff and the defendants; that possession of the chemical works, including the goods in question, has been delivered by the plaintiff to the defendants, and the purchase completed; and that the plaintiff is unjustly availing himself of what was a mere mistake in the wording of the notes.

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by the plaintiff to the defendants, and the purchase completed; and that the plaintiff is unjustly availing himself of what was a mere mistake in the wording of the notes.

Mellish now moved accordingly.—The defendant is entitled to plead this defence under the 83rd section of “The Common Law Procedure Act, 1854.” If the facts stated in the plea are well founded, a Court of equity would grant an absolute and unconditional injunction. This is not the case of an executory contract; but the defendant has done all that he was bound to do. [*Alderson*, B.—Suppose a Court of equity reformed the agreement, would there be an agreement in writing as required by the Statute of Frauds?] It is well established that Courts of equity will interfere in cases of written agreements, where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake: *Story’s Equity Jurisprudence*, ss. 155, 158. [*Alderson*, B.—The subject was considered in the case of *The Attorney-General v. Sitwell* (a), where the difficulty in reforming an executory agreement is pointed out.]

The Court then called on

Quain, who appeared to shew cause in the first instance.—To allow pleas of this kind will be, in effect, to transfer to Courts of law the power to reform instruments, which is the peculiar jurisdiction of Courts of equity: *Ball v. Storie* (b). Such was not the intention of the Legislature. The enactment in question was meant to apply to those cases only in which relief could be obtained in a Court of equity by *injunction*. But, in this case, a bill in equity would pray, first, that the agreement might be reformed, and then that such reformed agreement might be performed. There would be no injunction absolute in the first instance. Therefore, the subject-matter of the plea does not afford an

(a) 1 Y. & C. 559.

(b) 1 S. & S. 210.

e defence" within the meaning of the statute, but found for a specific suit in equity. [*Martin*, B.—is within the rule laid down by this Court in *The Royal Society v. Magnay* (a). The defendant, in 1853, "I hold the goods in question, and I defend holding them because I have an equitable right." *Alderson*, B.—It is a fair case to be argued, and ought to be allowed.] There is no affidavit in support of it.

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v.
HADDOCK.

; B.—There ought certainly to have been an affidavit in support of such a plea. It seems to me, that, if the plaintiff had obtained judgment in this action, the defendant might have filed a bill for an injunction absolute under the statute says, that "it shall be lawful for the plaintiff in any cause in which, if judgment were obtained, the defendant would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to relief by way of defence." We have already held, that relief must be absolute and unconditional; and in this case I think that absolute and unconditional relief ought to be granted. It seems to me, that there would be no objection to forming the agreement, when it is wholly executed, and the relief remains to be done by either party. The rule of the Court, therefore, be absolute on filing a proper affidavit (b).

Rule accordingly.

te, p. 489.

the following affidavit, one of the defendants, Messrs. Water-

in May, 1854, the plaintiff the owner of certain land, containing chemical works, materials, stock in trade, and utensils, situate at Presbury, in the county of Kent. On the 2nd of June, 1854, the defendants, Messrs. Water-

house, brokers in Liverpool, agreed to purchase from the plaintiff the said land, buildings, chemical works, machinery, utensils, stock in trade, and materials; and that the said brokers were employed to make the contract for sale and purchase thereof. That the contract was made by the said brokers, and was bought and sold notes, dated the 2nd of June, 1854; and that, by the mistake of the brokers, the

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bought and sold notes were so worded as not to include the stock in trade and materials, which were intended and understood by the plaintiff and the defendants to be included in the sale and purchase. That, shortly after the contract was made, namely, on or about the 7th of June, 1854, the plaintiff, through his agent, voluntarily delivered to the defendants the possession of the said lands, buildings, chemical works, machinery, utensils, stock in trade, and materials, which stock in trade and materials included certain quantities of coal, salt, and lead, lying on the premises. That, on or about the 18th of July, 1854, the plaintiff first made a claim on the defendants for the sum of 231*l.* 8*s.* 7*d.*, the alleged value of the said coal, salt, and lead, which claim was and still is denied by

the defendants, on the ground that the said coal, salt, and lead formed part of the purchase. That, owing to many difficulties and delays arising from the defective state of the plaintiff's title to the said land, buildings, and chemical works, the purchase was not completed until the 9th of November, 1854, when the completion was made without prejudice to the defence to this action. That the plaintiff is unjustly availing himself of what was a mere mistake in the bought and sold notes; and this deponent is advised and believes that the defendants have just ground to traverse the several matters proposed to be traversed by them; and that the matters sought to be pleaded by the defendants as an equitable defence are true in substance and in fact."

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BOYLE v. WISEMAN.

Jan. 23.

DECLARATION for libel—Plea, not guilty.

At the trial, before *Pollock*, C. B., at the last Surrey assizes, it appeared that the action was brought by the plaintiff, a Roman Catholic priest, to recover damages for libel on him alleged to have been written by the defendant, who was a Roman Catholic Archbishop and Cardinal. The libel had been published in a French newspaper called the "Univers," and afterwards in two English newspapers, called the "Catholic Standard" and the "Tablet;" and it purported to be an answer to a letter published in a French newspaper called the "L'Ami de la Religion" of which the Abbé Cognat was editor. For the purpose of proving that the defendant was the writer of the libel, the plaintiff called as a witness the Rev. H. Ivers, Roman Catholic priest, who deposed, that, shortly before the trial, he went to Paris, and there saw in the possession of the Abbé Cognat a letter (a) in the handwriting of the defendant, the contents of which he was prepared to give from memory; that he asked the Abbé Cognat to let him have the letter in order to bring it to England, but the Abbé refused. The plaintiff's counsel thereupon proposed to give secondary evidence of the contents of the letter; but the learned Judge ruled that such evidence was inadmissible. The plaintiff's counsel then called the defendant himself, who had been subpoenaed; but his counsel objected to his being sworn, on the ground that any questions put to him would tend to criminate himself. The learned Judge then asked the plaintiff's counsel what questions he proposed to put; but he declined to mention them, insisting on

A party to a suit, who is subpoenaed as a witness, cannot object to be sworn and examined, on the ground that the only relevant questions which could be put to him are such as would tend to criminate himself; but the opposite party has a right to insist on his being sworn and examined, and he must, if he thinks fit, claim his privilege not to answer such questions.

It is no ground for admitting secondary evidence of the contents of a private letter, that the person who has possession of the letter is beyond the jurisdiction of the Court, and has refused to deliver it up when requested by a person who did not disclose the purpose for which it was wanted.

Scoble, per *Pollock*, C. B., that the rules of law, as to admitting secondary evidence of the contents of public documents, apply also to commercial instruments and other documents which are the indicia of property.

(a) It was said that this letter defendant, that he was the writer contained an admission by the of the libel in question.

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his right to have the defendant sworn and examined. The learned Judge refused to allow it; and, being of opinion that there was no case for the jury, the plaintiff was nonsuited.

Edwin James in the following Term, obtained a rule nisi for a new trial, on the grounds, first, that secondary evidence of the letter had been improperly rejected; and secondly, that the Judge ought to have allowed the defendant to be sworn and examined.—He cited *Taylor on Evidence*, s. 323; *Alivon v. Furnival*(a), *Sayer v. Glossop*(b), *The Attorney General v. Radloff*(c). [*Parks, B.*, referred to *Hunter v. Leathley*(d). *Alderson, B.*, to *Marston v. Downes*(e).]

Shee, Serjt., Bramwell, and Badeley shewed cause.—First. Secondary evidence of the contents of the letter in question was not admissible. There is no authority or principle to warrant its reception. The rule of law is, that the best evidence must be given which the nature of the case will admit of; and secondary evidence is not receivable, unless it appears that all means have been exhausted to obtain primary evidence. If that has not been done, a presumption arises that the party does not produce the

document is in the possession of a person beyond the jurisdiction of the Court, who refuses to produce it on request of any third party. The person asking for this letter was wholly unconnected with the proceedings, and had no legal or moral right to demand it. [*Parke, B.*—The question is, whether all reasonable efforts have been made to obtain primary evidence: if it had been distinctly put to the *Jury* *Cognat*, "It is proposed to read this letter in evidence at the trial of an action for libel, will you allow it to be placed in my hands for that purpose?" and he had refused, perhaps that might have been sufficient to admit secondary evidence.] All reasonable means were not used to obtain the letter. The person in possession of it was not told that it was wanted for the purposes of justice, nor was he asked whether he would himself produce it at the trial, nor were his expenses tendered to him. It might have been of value to him, and he might simply have objected to deliver it to an unauthorised person. Besides, the plaintiff might have obtained a commission to examine him as a witness. This is a case in which the rule as to using all reasonable efforts to obtain primary evidence should be strictly enforced; for there was no proof of the existence of the letter in question except by the evidence of a person who had no right to see it. It might be attended with serious consequences, if secondary evidence were admissible under circumstances like these; for, if so, it would be equally admissible on a trial for murder or treason, and the witness could not be convicted of perjury. [*Pollock, C. B.*—No doubt, the danger of carrying the doctrine as to secondary evidence so far is, that a witness may make a document speak as he pleases. It might be, that the evidence related to a letter in which the defendant, in an action for criminal conversation, had admitted the *corpus delicti*. *Parke, B.*—This subject was discussed in *Alivon v. Furnival*(a) where the Court say,

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(a) 1 C. M. & R. 277.

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that secondary evidence of a document is admissible where it is in effect out of the power of a party to produce the original.]—They were then stopped by the Court as to that point.

Secondly. The learned Judge was right in not allowing the defendant to be sworn as a witness. [*Parke, B.*—It is difficult to get over the words of the 14 & 15 Vict. c. 99, s. 2, which says, that the parties to a suit shall be “competent and *compellable* to give evidence.” If they want to protect themselves, they must, nevertheless, come forward and be sworn, and then object to answer any question which tends to criminate them.] The enactment in question does not override the discretion of the Judge, whose duty it is to see that the time of the public is not wasted, and the oath profaned, by calling and swearing a witness for purposes other than that of evidence in the cause. No relevant question could have been put to the defendant which he might not have declined to answer. The only questions raised on the record are, whether the defendant was guilty of publishing the libel; and, if so, the amount of damage? [*Parke, B.*—He might have been examined with reference to the damages. *Alderson, B.*—What is to prevent him from being asked the amount of his income?] That subject could not be gone into until the question of guilty or not guilty was disposed of. It could never have been intended that a party should be compellable to be sworn as a witness, when the Judge could see, from the facts before him and the admission of counsel, that the only relevant question was one which the witness might refuse to answer. [*Parke, B.*—We cannot tell whether he would or would not answer; he might choose to waive his privilege. *Martin, B.*—The defendant might have been asked, “Are you Cardinal Wiseman, the defendant?” He could not refuse to answer that question; and then another witness might have been called, and have said, “That is the

person whom I saw write the libel." It is not suggested that the plaintiff has lost any actual benefit by the defendant not being sworn, but he merely seeks to stand upon his right. The very fact of the defendant refusing to answer would be evidence against him. [Parke, B.—I think not. The protection given by the statute would be no avail, if the refusal to answer was construed into evidence of guilt. It is impossible, however, to prevent the jury drawing their own conclusions. Alderson, B.—It seems to me that the case is altered by the 14 & 15 Vict. c. 99. Since that statute, I tried an action against a person for poisoning some dogs. He was seen walking in a plantation scattering something about, after which the dogs came out of the plantation licking their mouths, and were found to have eaten something which killed them. The defendant was called as a witness, and refused to say what was that he had thrown about the plantation. I told the jury, that, under such circumstances, it was not unreasonable for them to infer that he was the person who put the poisonous matter there, and no motion was made against that direction. As the law now stands, it seems to me that a party not denying a fact which it is in his power to deny, takes a colour to the other evidence against him.] But, even assuming that the learned Judge was wrong as to the second point, the Court will not grant a new trial unless they see that the evidence, if admitted, would probably produce a different result, and that substantial justice has not been done: *Crease v. Barrett* (a); *Rex v. Mawbey* (b), and *Teynham v. Tyler* (c), Lush Prac. 530, 531.

Lush, in support of the rule.—It was not objected at the trial that all reasonable efforts had not been made to obtain the primary evidence; if it had been, the plaintiff was prepared with evidence which would have removed the objec-

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(a) 1 C. M. & R. 919. (b) 6 T. R. 619. (c) 6 Bing. 561.

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tion. It is submitted, however, that in this case secondary evidence was admissible. The principle is, that all possible efforts must be used to obtain primary evidence; otherwise the presumption arises that such evidence, if produced, would be adverse. But there is no such presumption where the party who has possession of the document is not compelled to produce it. In such case, secondary evidence is admissible, whether the document be abroad or in this country, and whether it be of a public or a private nature. In *Sayer v. Glossop* (a), Pollock, C. B., said, "No point of law you cannot compel a party who has the possession of a document to produce it, there is the same rule as to admitting other evidence of its contents, as if its production were physically impossible." It is said, that the party should have obtained a commission to examine the document abroad; but he could not by that means have enforced the production of the original document, and the only remedy would have been to bring before the Court a different kind of secondary evidence, of which there are no degrees. If an attesting witness is abroad, it is not necessary to obtain a commission to examine him, but proof may be made by his handwriting. [*Martin, B.*—This subject was con-

then called as a witness ought to have been sworn and examined. At the trial, the circumstance of some discussion having taken place respecting the evidence which he was called upon to give, and of the counsel for the plaintiff, on being asked by me what questions he meant to put to the defendant, saying, "I will not state what they are; but I will insist on my right to put him in the box," certainly produced an impression on my mind that there was no real desire to have him there in order to answer any particular question, or prove any particular fact, but merely to insist on a right; and I thought that I was bound, as far as possible, to protect every witness, whether in a high or a low station, or whatever might be his condition in life, from the exercise of a right which was intended to be used rather for annoyance and exhibition than for the purposes of justice. But the opinion of the Court is, that, under such circumstances, the party must be sworn and must answer the questions put to him, or object to answer them, if he insists on any privilege in that respect.

As to the other point, so far as I have any knowledge of the past as found in reports and text books, or experience of the present, this is the first case in which the point has been deliberately brought forward for decision. The principle on which the decision ought to proceed is certainly not new, and is to be found in some modern cases; but I believe that the particular matter before the Court, on the trial of this cause, then arose for the first time in the administration of justice in this country. We are all of opinion, that the evidence given for the purpose of letting in secondary evidence of the contents of this paper was insufficient. It was nothing more than proof of a mere demand of the document made apparently by a stranger, who did not even disclose his object in making it. Possibly, evidence might have been given to supply the deficiency, if the objection had been put on that precise ground. The Court are of opinion that an opportunity should be afforded to the plaintiff of doing

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so, and of shewing, if he can, that he is entitled under the rules of law to give secondary evidence of this paper. I studiously call it a "paper," for, although I do not mean to express any dissent from the opinion of my learned Brothers, I entertain some doubt, whether, when the examination of the whole question takes place (as it probably will) it may not be found that there is no difference between documents which are of a public nature, such as registers, records, and matters proceeding from Courts of Justice and other public places; and documents which, though of a private nature, are meant to be made public, such as commercial instruments, charterparties, bills of exchange, bonds, and such matters, which are the indicia of property throughout the world. The first class are, clearly, documents of a public nature; the other, though private in one sense, are intended to be made public; and in the administration of justice it may, possibly, be right to allow them to be obtained in the same way as the former, and not to deal with them on the principles applicable to mere private letters, which convey no right, pass no interest, and which are private in the strict sense of the word. As I have already said, I do not dissent from the rest of the Court, but merely wish to call attention to the grounds of my opinion at the trial, in which, if wrong, I shall be happy to be corrected by the judgment of a superior tribunal; as, indeed, I now defer to the opinion of my learned Brothers; and I think that there ought to be a new trial on this ground also.

Rule absolute.

1855.

BREWER v. JONES.

Jan. 27.

DECLARATION for money payable for work done by plaintiff for the defendant.—Plea, never indebted.

At the trial, before the Under Sheriff of Gloucester, it appeared that the plaintiff, who was an officer of the sheriff of Gloucester, sought to recover from the defendant the sum of 1*l.* 16*s.* for mileage and expenses in arresting under *ca. sa.* one Enngblut, against whom a judgment had been entered at the suit of one Jones. The now defendant was attorney of Jones the plaintiff in that action, and had procured the writ with the sheriff's agent in London, but given no special instructions as to its execution.

Under these circumstances, it was submitted, on behalf of the defendant, that he was not liable. The Under Sheriff was of opinion that a sheriff's officer was, in this respect, in the situation of an officer of the Court, and was entitled to look to the attorney in the cause for his fees; and he accordingly directed a verdict for the plaintiff for the amount claimed.

A bailiff may recover from the attorney in the cause the costs of executing a writ of *ca. sa.*, although the bailiff was not specially nominated by the attorney.

Hawkins, in the present Term, obtained a rule nisi for a new trial on the ground of misdirection; against which

Gray shewed cause.—The attorney, and not the client, is liable to the sheriff's officer for the costs of executing the writ. It is true, that, in *Maile v. Mann*(*a*), and *Walbank Quarterman*(*b*), the attorney, when he lodged the writ with the sheriff, named a particular bailiff to whom it was to be delivered for execution; but that circumstance makes no difference. The principle on which those authorities proceed is, that the costs of executing a writ of *ca. sa.* are

(a) 2 Exch 608.

(b) 3 C. R. 94.

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part of the ordinary disbursements of the cause, and for which the attorney has no authority to pledge his client's credit. In *Walbank v. Quarterman*(a), it was argued that the case of a bailiff was similar to that of a witness, who, in the absence of a special contract, cannot recover his expenses from the attorney who has subpoenaed him: *Robins v. Bridge*(b); but *Maule, J.*, says, "The case of a bailiff is much more like that of an officer of the Court than that of a witness. The inconvenience would be prodigious, if it were held that the officer must look to the client for his fees; and there is no inconvenience in the other course." *Townshend v. Carpenter*(c) and *Foster v. Blakelock*(d) do not affect the present question. At the time those cases were decided, a bailiff could only claim the fee of fourpence, allowed by the 23 Hen. 6, c. 9; and therefore, in order to entitle him to the caption fee and other expenses, it was necessary for him to shew a contract to pay them. The principle on which those decisions proceeded was, that the fact of the attorney having named the bailiff, and that these expenses were usually paid by attorneys and allowed by the Master on taxation, raised a presumption that the attorney employed the bailiff upon an undertaking to pay what was usual in such cases. Now, however, the law is altered by the 7 Will. 4 & 1 Vict. c. 55, s. 2(e), which enables sheriffs and their officers to demand such fees as are allowed by the taxing officers. These fees are, therefore, legally due to the bailiff; and it is no longer necessary to shew any specific contract by the attorney to pay them, beyond the fact of his lodging the writ with the sheriff.

Hawkins in support of the rule.—In all the reported cases, in which the attorney has been held liable to the bailiff for his fees, the latter has been nominated by the

(a) 3 C. B. 94.

(b) 3 M. & W. 114.

(c) R. & Moo. 314.

(d) 5 B. & C. 328.

(e) See, also, 5 & 6 Vict. c. 26, s. 31.

ttorney. *Maybery v. Mansfield*(a) decided that an attorney is not liable to the sheriff for his costs of executing a writ of *ca. sa.*, unless there be circumstances from which a jury may infer an actual undertaking by the attorney to pay. *Poster v. Blakelock*(b) proceeded on the ground that the officer was specially employed by the attorney to make the arrest; and *Bayley, J.*, there says: "Where a party leaves to the sheriff to execute a writ by his own officer, nominated by himself, the question is very different from that which exists in the present case." [*Parke, B.*—In *Robins v. Bridge*(c) it is said, that the fees of the officers of the Court are ready-money transactions, for which the person engaged in the business of the Court is liable; and that it cannot be presumed that the client would authorise him to pledge his credit where no credit is given.] Assuming that the attorney, and not the client, is liable for these expenses, the bailiff cannot sue for them. Unless the bailiff is specially employed, he is the mere servant of the sheriff.

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POLLOCK, C. B.—The rule must be discharged. It is sufficient to say that the case of *Walbank v. Quarterman*(d) decides the question now before us. We are not, indeed, bound by that decision; but, unless there is some strong reason or principle which induces us to differ, we ought to decide in conformity with it. I must, however, say, that, whatever is the weight of Mr. *Hawkins'* argument, no one who understands the subject can fail to see, that at least the most convenient rule is that which renders the attorney, and not the client, liable.

PARKE, B.—We must adhere to the decision in *Walbank v. Quarterman*, though I confess that it is at variance with the notion which I entertained, that a bailiff could not maintain an action for his fees, unless there were some cir-

(a) 9 Q. B. 754.

(b) 5 B. & C. 328.

(c) 3 M. & W. 114.

(d) 3 C. B. 94.

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cumstances from which a contract with him could be implied. That case, however, and the subsequent decision in this Court of *Maile v. Mann*, are opposed to that view, and I reluctantly bow to those decisions.

ALDERSON, B.—I think that it is good to abide by those decisions. These matters are mere questions of practice, and when once settled one way or the other—it is not very material which—we should adhere to it. I agree with the last decisions.

MARTIN, B.—I am of the same opinion. If the point were new, it is difficult to see how a person, by lodging a writ with a sheriff, can make himself liable to two parties, viz. the sheriff and the bailiff. I think, however, that it is not unreasonable to hold the attorney liable, because he knows more about the matter than his client; and if he wishes to restrict his liability, he should allow the client himself to employ the bailiff.

Rule discharged.

1855.

the County Court of GLOUCESTERSHIRE holden
at Much Marcle, between JOHN HERNAMAN and THOMAS

Jan. 27.

RA, in this Term (January 18), had obtained
rescind an order of *Platt*, B., for a writ of pro-
above cause, directed to the Judge of the
of Gloucestershire holden at Newnham.

from the affidavits, that, in October, 1854, a
above cause issued out of the County Court
by leave of the Court. The defendant at that
ix months previously, had dwelt and carried
at Much Marcle, within the district of the
County Court holden at Ledbury. The
t to recover 20*l.*, the amount of a reward of-
fellowing handbill :—

“HEREFORDSHIRE.

RCLE ASSOCIATION FOR THE PROSECUTION
OF FELONS.

names are hereunto subscribed, having entered
tion for the detection, apprehension, and pro-
ms, do hereby offer the following

REWARDS

re what is allowed by Act of Parliament) for
ing of any person or persons who shall com-
ther of the under-mentioned offences, on any
r respective persons or properties, viz. :—

ng any horse, mare, or geld-
eward of £20 0 0
ing sheep, a reward of . . . 20 0 0
ere followed several other rewards).

rewards will be paid on conviction of the
pplying to Mr. H. Burgum, the treasurer.
several persons, including the defendant).”

The term
“cause of ac-
tion” in the
60th section
of the 9 & 10
Vict. c. 95,
which gives
jurisdiction to
the county
court of the
district “in
which the
cause of
action arose,”
means the
“whole cause
of action.”

Therefore,
where an asso-
ciation, of
which the de-
fendant was a
member, offer-
ed a reward
for the appre-
hension and
prosecution of
persons com-
mitting certain
offences, such
reward to be
paid on con-
viction; and
the plaintiff,
within a dis-
trict of the
county court
of G., appre-
hended an
offender, who
was tried and
convicted
within a dis-
trict of the
county court
of H.:—*Held*,
that the coun-
ty court of G.
had no juris-
diction to en-
tertain a plaint
for the reco-
very of the
reward.

may, by leave of the Court, issue in any district where the cause of action arose;" the latter gives the courts concurrent jurisdiction with the superior courts where the cause of action did not arise wholly or material point within the jurisdiction of the court in which the defendant dwells or carries on his business at the time of the action brought." The term "cause of action," in the 60th section, means the "whole cause of action;" that is, everything which it is necessary for the plaintiff to allege and prove as a condition precedent to his right to recover. In *Buckley v. Hann* (a) (where the cause of action arose under the London Small Debts Act, 10 & 11 Geo. 4, c. 76, s. 1), a bill of exchange was drawn and accepted, and the indorser put his name upon it within the city of London, but it was delivered to the indorsee in the county of Middlesex, and this Court held that the whole "cause of action" did not arise within the city of London. So, where a bill was made, and the testator died within the jurisdiction of the County Court, but letters of administration were granted in a place beyond that jurisdiction, it was held that the grant of letters of administration was part of the cause of action within the meaning of the 9 & 10 Geo. 4, s. 60: *In re Fuller* (b). In *Regina v. Birch* (c), a bill of exchange was drawn by the plaintiff at London, and accepted by the defendant in London, but it was sent to Norwich, and at maturity dishonoured. It was held, that the "cause of action" arose in London, since the contract raised by the acceptance was made at that place. [Parke, B.—Everything which the plaintiff was bound to do, in order to recover the reward, was done by him within the jurisdiction of the County Court, but the event depended on a contingency, over which he had no control; therefore, does not the case depend on that of a promise, founded on good consideration,

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Exch. 43. (b) 2 E. & B. 573. (c) 1 Bail C. C. 56.

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to pay a sum of money if J. S. shall go to Rome? In such case would not the County Court of that district where the contract was made have jurisdiction, inasmuch as the contract was performed so far as depended on the parties themselves?] The only County Court which would have jurisdiction would be that for the district in which the defendant resided. In *Borthwick v. Walton* (a), the Court of Common Pleas held that a County Court had no jurisdiction where goods were delivered within a district of such court in pursuance of a contract made out of it. *Maule, J.*, there says: "I think that both the natural construction of the words and the spirit of the Act shew that the 60th section means the district in which the whole cause of action arose. The section limits the liability of a defendant to being sued in the district of the County Court in which he resides or has resided for the last six months, or where the whole cause of action took place, and not where a part only of it has occurred." Here the Statute of Limitations would not begin to run until after the conviction, which shews that the conviction is a material part of the cause of action. So, in an action on a life policy or a post obit bond, the death of the insured or obligor is part of the cause of action. [*Alderson, B.*—Here, the conviction is not a condition precedent, properly so called. This is not like an action on an attorney's bill, where a signed bill must have been delivered a month before action brought; because there the "cause of action" is the work done, and a delivery of the bill is a condition precedent to the right to sue in respect of it; but here there is no cause of action until conviction.] In *Com. Dig. "Courts,"* (P. 9), it is said, with reference to inferior courts, that "if the cause of action does not appear to be within the jurisdiction of the Court it is error," &c. as "in assumpsit, quod non molestaret the Jesuits, without saying that the Jesuits lived within the jurisdiction." [*Parte, B.*

(a) 15 C. B. 501.

examples there collected, something was to be the party, as for instance, "that he would procure of a house in A., without saying that A. is within the jurisdiction." It is afterwards said, "in an action upon the promise for abusing a horse committed to his care, by the defendant, need not be said that he rode *infra jurisdictionem* for the gist of the action is the neglect: B. Mod. 74." In 1 Wms. Saund. 74 a, note (1), it is said, "in inferior courts it is necessary that every fact which is the gist and substance of the action should appear to be within their jurisdiction; therefore, the gist of the promise must be laid in the declaration within the jurisdiction. But for such matters as are only for aggravation of damages, and might be proved and yet the action remain, it is not necessary to lay them within the jurisdiction." Where words are material in respect of special damage, the special damage must be laid within the jurisdiction: *Ireland v. The Post Office* (a).

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See in support of the rule.—There was a "cause of action" within the jurisdiction of the Newnham County Court though it could not be enforced until conviction. When the verdict was made, the consideration arose, and everything required to be done on the part of the plaintiff was done by him within the jurisdiction of that court; the cause of action alone, which was an act of the law, over which the court had no control, took place out of that jurisdiction. The "cause of action" in the 9 & 10 Vict. c. 95, s. 60, has the same meaning as that term in the Statute of 1848. In the statute of Victoria, it means the gist or substance of the action. That enactment was made with reference to the locality of trial, not the time of the action. The Statute of Limitations relates solely to the remedy.

(a) Cro. Car. 570.

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at the time of attempting to enforce the right. But, even under the Statute of Limitations, the cause of action remains, though the right to sue is barred. The substance of the action must be regarded as the "cause of action." It is not a true test that everything which must be proved by the plaintiff, in order to entitle him to recover, is part of the cause of action. In case for negligent driving, the declaration alleges a contract to carry, the negligence of the defendant, and the injury to the plaintiff; yet, the cause of action arises so entirely where the injury was sustained, as to retain the venue in that county: *Williams v. Land* (a). So, if a trench cut in the county of N. causes the plaintiff's land to be overflowed in the county of W., the action may be brought and tried in W., although the statute requires all actions to be brought and tried in the county where the cause of action arises: *Sutton v. Clarke* (b). Also in Com. Dig. "Action" (N. 5) 7, it is said, "Though the action be founded upon a thing mixed with mere matter of record in another county, as an action upon the case for procuring him to be outlawed at Westminster, whereupon he was imprisoned upon a *capias utlagatum* in Norfolk, it shall be brought in Norfolk, for there was the visible

reward. *In re Fuller* (a) proceeded on the ground, that, until the grant of letters of administration, there was no person in existence capable of being sued; and the Court acted on the authority of *Murray v. The East India Company* (b), which turned on the Statute of Limitations. *Buckley v. Hann* (c) was decided on the principle, that, without delivery of the bill of exchange, there was no indorsement, and therefore no contract. In *Borthwick v. Walton*, the contract was made out of the jurisdiction of the county court. In *Regina v. Birch* (d), the cause of action arose where the bill was accepted. [*Alderson, B.*—The contract without the conviction would not form a cause of action, neither would the conviction without the contract; they are in different counties, and therefore the cause of action is in neither.] In declaring on a post obit bond, it is not necessary to allege the death of the obligor. In an action on an attorney's bill, the delivery of the bill is no part of the cause of action.

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POLLOCK, C. B.—The rule ought to be discharged. It is not necessary to enter upon any discussion of the many cases cited in the course of the argument. I found my judgment upon this: that it is very clear, that the conviction is part of the cause of action. Several matters may combine in order to make a cause of action, in the absence of any one of which it would fail. Here, without the conviction there is no cause of action, for the conviction not only marks the time when the reward is payable, but it determines whether it is payable or not. The Court of Common Pleas has construed the term "cause of action," in the enactment in question, to mean all and every part of the cause of action. We consider ourselves bound by that decision, and are not prepared to doubt or dissent from it.

(a) 2 E. & B. 573.

(b) 5 B. & Ald. 204.

(c) 5 Exch. 43.

(d) 1 Bail C. C. 56,

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The rule will therefore be discharged; but as there was a difference of opinion between two learned Judges on the subject, it will be discharged without costs.

PARKE, B.—I am of the same opinion. At first, I thought a distinction might be made between a cause of action depending upon what was necessary to be done by the plaintiff, to enable him to recover; and where there was a contingency, upon which the right to recover depended.—Looking at the old authorities, I thought there might be that distinction. However, all the cases have been brought before the Court, and the point has been ably argued on both sides, and I am now satisfied that no such distinction exists. The term “cause of action” means all those things necessary to give a right of action, whether they are to be done by the plaintiff or a third person. In this case, before the plaintiff could be entitled to recover, there must be a conviction. That took place in the county of Hereford; therefore the whole cause of action was not within the jurisdiction of the Gloucestershire County Court. On full consideration of the case, I concur in thinking that the rule ought to be discharged.

ALDERSON, B.—I am of the same opinion. The very circumstance of the phrase “whole cause of action” being used, shews that there may be a cause of action composed of several parts. Then, if the cause of action be composed of several parts, the whole cause of action arises where each and every part took place. Here, one part of the cause of action is the conviction, and that took place in Herefordshire, and therefore the whole cause of action did not arise in Gloucestershire. We cannot, without deceiving ourselves, come to any other conclusion.

Rule discharged.

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Jun. 30, 31.

ase the defendant was served with a writ of sum-
mation, which was indorsed as follows:—

Following are the particulars of the plaintiff's claim:

Amount of defendant's promissory note, dated 8th July, 1853, payable to plain- tiff on demand	£ 200
Amount of defendant's promissory note, dated 13th August, 1853, payable to plaintiff on demand	300
Amount of defendant's I. O. U., dated 14th December, 1853, payable to plain- tiff	500
	£1000

Amount being for money lent and advanced by the
defendant.

Plaintiff also claims interest on 200*l.* at 10*l.* per
annum, and on 800*l.* at the rate of 5*l.* per cent.
from the 29th day of December, 1854, until
judgment."

Defendant not having appeared to the action, the
signed judgment for the sum claimed and in-

was moved for a rule nisi to set aside the judgment
and judgment.—The plaintiff was not entitled to sign judgment.

will set aside the judgment, and make the attorney pay the costs.

X X

EXCH.

The 25th section of "The Common Law Procedure Act, 1852," which enables a plaintiff to make on the writ of summons a special indorsement of his claim, *with interest*, is not confined to cases in which interest is payable by contract, express or implied. Therefore, where a plaintiff by such indorsement claimed interest on an I. O. U., and in default of appearance signed judgment:—*Held*, that the judgment was regular.

But, in all cases, except those of bills of exchange and promissory notes, if a plaintiff, by such indorsement, claims interest where it is not due by contract, express or implied, and on default of appearance signs judgment for it, the Court

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ment without filing a declaration. The 25th section "The Common Law Procedure Act, 1852," which en-
 plaintiff to make on the writ of summons a special

(a) The following sections were referred to:—

Sect. 25. "In all cases where the defendant resides within the jurisdiction of the Court, and the claim is for a debt or liquidated demand in money, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt, or on a guarantee, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or

Sect. 26. "From the time this Act shall commence, this Act shall commence to take effect, so much of the Act of Parliament passed in the twelfth year of the reign of late Majesty King George the Fourth, intituled *An Act to amend the several Acts relating to the recovery of debts, and so much of the Act of his late Majesty William the Fourth as relates to the entering an appeal, and the defendant by the plaintiff in any action in any of the superior Courts, shall be taken, and no appearance shall be entered by the plaintiff or defendant."*

Sect. 27. "In case of non-appearance by the defendant

claim, does not apply to unliquidated demands. interest " in that section means interest payable, either express or implied. An I. O. U. is merely a debt due upon an account stated, and interest recoverable upon it by way of damages. [*Pollock*, whose instrument was in this form: "I. O. U. interest until payment;" and how can we tell not? *Martin*, B.—The plaintiff is allowed to sue, not because a debt is due, but because the instrument is admitted. If a person was about to frame an instrument giving a right to sign judgment, inasmuch as a debt was claimed to be due from a person, and he knew it, what other words would be used?] The rule applies to what is strictly *interest*. This is a *damages*, which, under the 3 & 4 Will. 4, c. 42, the jury are at liberty to allow or refuse. [*Alder-*

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ified, if any, to the judgment, and a sum to be fixed by the court. The said superior court may, in any three of them, by the approval of the judge, or any eight of them, or the Lord Chief Justice, or the Lord Chief Justice and the Lord Chief Justice, or any three of them, unless the court shall otherwise order, in more than such cases, in which case the court may tax in the ordinary manner the plaintiff may, on judgment, issue execution on expiration of eight days after the last day for appeal, and not before: provided, that it shall be the duty of the Court or a Judge, before or after final judgment, to direct the defendant to

defend upon an application, supported by satisfactory affidavits accounting for the non-appearance, and disclosing a defence upon the merits."

(a) Enacts: "That, on all debts or sums certain, payable at a certain time or otherwise, the court, on the trial of any issue or any inquiry of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand

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son, B.—The 25th section says, that, in all cases where the *claim* is for a debt or liquidated demand in money, with or without interest, arising upon a contract express or implied, the plaintiff may make on the writ a special indorsement; and then, by the 27th section, if the defendant does not appear, the plaintiff may proceed, as there directed, to sign final judgment for the sum indorsed on the writ, together *with interest* at the rate specified. Here the plaintiff claims interest—It is true that he might not claim it successfully if the question was submitted to a jury: but he claims it, and the defendant admits the claim.] The plaintiff has no right to indorse upon the writ any claim which requires the intervention of a jury under the 3 & 4 Will 4, c. 42, s. 25. [*Pollock*, C. B.—We must take it for granted that the claim is not made without some foundation. If so, it was the duty of the defendant to appear and question it; not having done so, he impliedly admits it. The object of the enactment was to prevent the expense of a declaration. *Martin*, B.—If the 25th, 26th, and 27th sections of the statute be read together, it is evident that it is the *claim* which is the foundation of the judgment, and not a real right of action. The statute enables a special indorsement to be made of any claim to a debt or liquidated demand, and, further, of any claim to interest. Then there is a notice on the writ, that, if the defendant does not appear, “the plaintiff will be at liberty to sign final judgment for any sum not exceeding the sum above claimed, with interest at the rate specified:” that is, the plaintiff will be entitled to sign judgment, not for interest really due, but for interest claimed on the writ. *Parks*, B.—There is considerable difficulty in the case. Suppose a

shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment: provided

that interest shall be payable in all cases where it is now payable by law.”

im is made for interest which is not due by contract
 her express or implied, in what way is the defendant to
 pute it? If he defends the action and goes to trial, the
 y may give it as damages. The Legislature could never
 re intended that a claim should be inserted, where it
 s optional with a jury to allow it or not.]

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Lush shewed cause in the first instance.—The 25th section mentions some claims on which interest is not recoverable without the intervention of a jury, viz. cheques and warrants. [*Alderson*, B.—The Act says that interest is to be calculated “at the rates specified:” that is, the rate then on the back of the writ. The conduct of the defendant shews that he admits that claim. *Parke*, B.—The doubt which occurred to my mind was, that the statute only contemplates a claim for interest due on a contract express or implied, and was not meant to include that which was the subject of inquiry before a jury, who might or might not allow it. But perhaps the difficulty may be answered in this way:—The latter part of the 25th section says, that the indorsement shall be considered as particulars of demand; and, therefore, if the defendant resists the claim, the plaintiff cannot recover for anything but what interest by contract express or implied, and he cannot take the jury for interest under the 3 & 4 Will. 4, c. 42.]—The case was then stopped by the Court.

PARKE, B.—The difficulty which I felt in this case seems to me to be obviated by the consideration which I have just mentioned. In my opinion, the indorsement given by the statute applies solely to claims which are liquidated, and do not depend on the finding of a jury. The language of the 25th section is, “where the claim is for a debt or liquidated demand in money, with or without interest, arising upon a contract express or implied;” and

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reading that clause according to its ordinary grammatical construction, it means interest due upon a contract express or implied, and does not apply to any case in which it is optional with the jury to give interest as they may be advised according to the justice of the case. That being so, we cannot at present determine upon the face of this particular, what is the description of interest which the plaintiff claims? It may turn out that it is not a liquidated demand; but if so, the proper course was for the defendant to appear to the action, and then, as the indorsement is to be considered as particulars of demand, the claim would be confined to interest rightfully due by contract express or implied.

ALDERSON, B.—It seems to me that the special indorsement, allowed by the statute, is of a *claim* only; and the defendant, if so disposed, may dispute it by appearing, and then the indorsement assumes the form of particulars of demand. Now, suppose in this case there had been a declaration, with these particulars annexed to it, and the defendant had appeared and admitted the entire claim, would he not have been liable to pay interest at the rate specified? Surely he would, inasmuch as he conceded that he was bound by law to pay the interest claimed. Then, is not the defendant's non-appearance, where the rate of interest claimed is specified by indorsement on the writ, equivalent to that? In my opinion, it is the same as if the defendant admitted every word of the indorsement to be correct, and that he was bound to pay the whole demand. Then, what is the demand? It is a demand of a debt and interest; and, if the defendant admits it, he ought to pay it. Again, suppose the plaintiff by his indorsement says, "I claim for ten sacks of flour, for which you owe me 20*l.* with interest at 10*l.* per cent.;" if the defendant neglects to appear, does he not admit that he owes 20*l.* for ten sacks

flour, and 10l. per cent. interest? That being so, is not everything stated in the special indorsement *eo ipso* evidence of the fact, with this limit, that the plaintiff cannot have judgment for a greater sum than is stated in the indorsement.

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MARTIN, B.—I have already expressed my opinion on the subject. The very great majority of cases for which actions are brought, are debts or money demands to which there is no defence. It was considered extremely desirable that in such cases the parties should be put to the least possible expense. In many of such cases interest is payable; and by the 25th section the plaintiff is authorised to make indorsement in the form contained in Schedule A.; and it is clear to me, that, under it, interest may be claimed. The right to sign judgment is upon the claim; and, as interest may be lawfully claimed, I think judgment may be made for it. This seems to me to be the plain and precise language of the enactment; and that, in order to carry out the intention of the Legislature, no more appropriate language could have been used. As to the advantage of the enactment, it is well known to have been exceedingly great. If the holder of a dishonoured bill of exchange were told that he could not recover interest by a special indorsement on the writ, he would in many cases abstain from making one, which would be most injurious to defendants. The case is different from that of *Rogers v. Hunt*(a), for there the claim was for the expenses of noting.

On the following day,

POLLOCK, C. B., said—In the case of *Rodway v. Lucas*, which was argued before us yesterday, and in which we

(a) Ante, p. 474.

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decided that the 25th section of the Common Law Procedure Act, 1852, authorised interest to be claimed by the special indorsement on the writ; we wish that it should be distinctly understood by the profession, that in all cases, except bills of exchange and promissory notes (as to which it is the usual practice of the Court to allow interest as a matter of course when the jury give a verdict for the plaintiff), if we find that any party not entitled to interest under an express or implied contract shall, nevertheless, claim it by a special indorsement on the writ, in order to gain an improper advantage, and in default of appearance sign judgment for a larger sum than he is really entitled to, we will not only set aside such judgment, but visit the attorney with the consequences of his abuse of the law, by making him pay the costs.

Rule refused.

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Jan 30.

uration stated, that the plaintiffs, being bottle The plaintiffs,
 rs at Alloa, in Scotland, and being about to bottle manu-
 agent at Leith, the defendant, in consideration facturers in
 Scotland, in
 1840, entered
 into negotia-

V. M'K. for the employment of the latter as their agent at Leith for the sale
 On the 4th January, 1841, W. M'K. wrote to the plaintiffs, and offered to act
 upon certain terms, amongst which were the following :—"First. All bottles
 or risk, and all monies received for you to be duly accounted for by me and
 from time to time. Fourthly. Security to be found for my intronmissions
 of 500*l.* sterling." W. M'K. was appointed by the plaintiffs to act as their
 sent to him the following form of guarantee, which he transmitted to his
 fendant, and which was duly executed by the defendant :—"Gentlemen,—I
 guarantee my brother Mr. W. M'K's intronmissions, as your agent in Leith,
 of 500*l.* sterling; and I am, &c., H. M'K. To Messrs. S. & Co. (the plain-
 fendant never asked for nor received any information as to the nature of his
 M'K's, employment, nor was he aware of the times and manner in which
 s to account to the plaintiffs. The word "intronmission" is a term partly
 mercantile, and signifies dealings with stock, goods, and cash of a prin-
 to the hands of his agent, and to be accounted for by the agent to his
 n after the commencement of the agency, it was agreed between the plain-
 K. that the latter should furnish to the plaintiffs every six months an ac-
 of the stock sent by them, and of cash received by him from customers.
 ntinued for about a year and a half, when an agreement was entered into
 aintiffs and W. M'K., but without the defendant's knowledge or consent,
 hould, from time to time, make his promissory notes payable four months
 four of the plaintiffs, and that he should send them to the plaintiffs at the
 ne note per month; and that, on the notes becoming due, W. M'K. should
 plaintiffs an account of all the debts or sums he had collected from their
 i that the plaintiffs should send him such an amount of cash as would,
 the money already in his hands, enable him to take up the notes. This
 immediately acted upon, and was continued to be acted upon by the plain-
 K. until the termination of his employment as their agent. The notes were
 at of the plaintiffs without reference either to the amount of the stock re-
 M'K. for sale, or to the amount of sales made by him, or to the out-
 or to the proceeds of sales or sums collected by him from the customers
 in his hands; and it sometimes happened, that notes were made by him
 any hundreds of pounds the value of the stock received, of the outstanding
 he proceeds or sums collected by him. These notes on being transmitted
 were indorsed by them to their bankers who gave them a cash credit
 e same were always duly honoured on arriving at maturity. This, how-
 ione without the knowledge or consent of the defendant. One of the
 plaintiffs in requiring W. M'K. to make the notes in their favour, was to
 wn credit and to furnish them with funds for the payment of the duties;
 otive and the practical effect of the arrangement was, to cause W. M'K. to
 monies collected by him more promptly to the plaintiffs than he would
 done. In May, 1850, W. M'K. ceased to be in the employment of the
 t that time had received certain monies for the plaintiffs for which he did
 t able to account.

upon the above guarantee, *Held per Parke B., Alderson B., and Martin B.*,
 as the guarantee left the mode of accounting open to the will of the employers,
 adopted a reasonable one, the agreement between the plaintiffs and their
 .., as to the mode of accounting by means of promissory notes, as above
 not discharge the surety from his liability upon the guarantee—*Pollock, C. B.*,

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that they would employ his brother, William M'Kean, as such agent, to receive and sell bottles for the plaintiffs, and to collect and pay over the proceeds of such sales to the plaintiffs, agreed to guarantee the payment to the plaintiffs of all such monies as William M'Kean should receive as such agent, to the extent of 500*l*.—Averments: that the plaintiff from thence until May, 1850, employed William M'Kean as such agent; and that, during such agency, he received on account of the plaintiffs monies which he refused to pay over; and at the expiration of such employment, there was, and still is, due to the plaintiffs 370*l*.

The defendant pleaded (*inter alia*) the Statute of Limitations, and also a plea setting out the agreement hereinafter mentioned, between the plaintiffs and William M'Kean, that the latter should, on account of the sums collected, make promissory notes payable four months after date to the plaintiffs' order; and alleging, that, in pursuance of the agreement, William M'Kean made three such promissory notes for the respective sums of 234*l*. 13*s.*, 265*l*. 10*s.*, and 172*l*. 5*s.* 6*d.*; and that time was thereby given to William M'Kean without the defendant's consent. Issue having been joined on the pleas, a verdict was found, by consent, for

ours of the 31st of December, and now make you the following offer to act as agent for the Alloa glass-works in this quarter and neighbourhood.

"First. All bottles to be sold at your risk, and all monies received for them to be duly accounted for by me and rendered to you from time to time, my being careful as to the credit of the parties to whom they are sold.

"Second. Regular books and accounts to be kept by me for your business, and these to be always patent for your inspection. Account sales to be rendered at the end of each month or when required, also list of outstanding debts and account current every three weeks.

"Third. My commission to be $2\frac{1}{2}$ per cent. on all monies received; and all charges, such as portorage, freight, &c., to be paid by you.

"Fourth. Security to be found for my intromissions to the extent of 500*l.* sterling. I shall be obliged by your sending me a copy of the letter of security required, and my brother, Hugh M'Kean, agent for the Scottish Widows' Fund and Life Assurance Company, London, will sign it.

"Yours very respectfully, W. B. M'KEAN."

William M'Kean was thereupon appointed agent to the plaintiffs, and shortly afterwards received from Mr. Sandford, one of the plaintiffs, the following letter written to him:—

"Randolph Crescent, 6th January, 1841.

"Dear Sir,—Annexed you will find the form of a letter of guarantee to be written out and signed by your brother, which I send you at Mr. Stewart's request. If you think the sum too large, you might fill it up at any amount you wish. It is more a matter of form than anything else; but as we require a guarantee from all our agents, it is proper that it should be given even when unnecessary.

"Yours, &c., E. D. SANDFORD."

The form of the letter of guarantee referred to in the above letter, and annexed to it, was as follows:—

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M'KEAN.

"London, 11th January, 1841.

"Gentlemen,—I hereby agree to guarantee my brother Mr. W. M'Kean's intromissions as your agent in Leith, to the extent of five hundred pounds sterling.

"And I am, Gentlemen, your obedient Servant,

"To Messrs. Stewart & Co.,

H. M'KEAN.

"Bottle Manufacturers, Glass Works, Alloa."

William M'Kean forthwith transmitted to his brother, the defendant, the above letter of the 6th of January, 1841, together with the form of guarantee annexed thereto; and shortly afterwards received back from the defendant the form of guarantee duly executed by the defendant, and handed it over to the plaintiffs.

The letter above set forth, of the 4th of January, was not communicated to the defendant. The defendant never asked for, nor received, either from the plaintiffs or William M'Kean, or from any other quarter, any other information as to the nature of the employment of William M'Kean, or as to his own liability on the guarantee, than was conveyed by the letter of the 6th of January and the accompanying form of guarantee. He was not aware of the time

ing continued for about a year and a half, the following agreement was made between the plaintiffs and William Kean:—It was agreed between them, but without the knowledge or consent of the defendant, that William Kean should, from time to time, make his promissory notes, payable four months after date, in favour of the plaintiffs, and send them to the plaintiffs at the rate of one per month; and that, on the notes becoming due, William M'Kean should transmit to the plaintiffs an account of all the debts or sums he had collected from their customers; and that the plaintiffs should send him such amount of cash as would, when added to the money already in his hands, enable him to take up the notes. This practice, so agreed upon, was immediately acted upon, and continued to be acted upon until the termination of employment of William M'Kean by the plaintiffs in July, 1850; and, in pursuance of such practice, William Kean rendered to the plaintiffs a monthly account of all received by him. The notes were made on account of the plaintiffs, after the agreement referred to, without reference either to the amount of stock received by William Kean for sale, or to the amount of sales made by him, or the outstanding debts, or to the proceeds of sales or sums collected by him from the customers and remaining in his hands; and, although the balance occasionally varied, generally happened that notes were made by him to the extent of between 300*l.* and 500*l.*, and sometimes to the extent of 800*l.* and 900*l.* over and above the value and amount of the stock received, of the outstanding debts, and of the proceeds or sums collected by William M'Kean. The notes, when received by the plaintiffs, were indorsed by them to their bankers, who gave them a cash credit thereon; and the same were always honoured at maturity in the manner above stated to have been agreed upon.

The following are letters and extracts from letters from William M'Kean to the plaintiffs in reference to such promissory notes:—

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due next month, and I fear there will be no funds collected in time to retire it."

"Leith, 3rd

"On my return home this morning, I received a letter from Mr. Stewart, of the Alloa Glass Works [the plaintiffs], wishing me to send my P. O. D. for four months, and inclose to him in London; on inclosing sealed this letter, he adds a memorandum requesting discount it here, and remit the net proceeds. With this object in view, you will observe I cannot discount the bill [note], and you know I cannot discount a promissory note; I have therefore sent it to be cashed needful with the Western Bank, of which I have written Mr. Stewart by this post."

"Leith, 29th

"It is my intention to be here all Saturday. I wish money for duties, you can draw for 4 months, as there will be only one bill [note] after next month."

"Leith, 17th

"Agreeably to your request Mr. Stewart has accepted another draft for your accommodation for 450*l.* at four months from 6th March, now running, while the stock is at present 1625*l.* at present running, while the stock is recoverable debts, including Cockburn's, will not amount to 700*l.*, so that when the larger shipments will require to be made on

as may from time to time require for your shipments of bottles, I agree to accept your drafts on me at four months, your allowing me a commission of one per cent. upon the half the amount of your transactions throughout the year."

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"Leith, 30th March, 1847.

"I am favoured with your Mr. Stewart's note of yesterday, and in terms of it now inclose you my P. N. 635*l.* 12*s.* 6*d.* from to-morrow's date, and forward it to Glasgow as desired."

"Leith, 1st April, 1848.

"I have been gradually led into an extent of bill [note] transactions with you, which I never contemplated when the proposal was made to me, and you cannot but be aware if my credit should suffer from your allowing the bill for 185*l.*, due 27th ultimo, to be noted, (a circumstance that has never taken place since I have been in business on my own account, now upwards of twenty years), and supposing any disaster should befall me in business, you must yourselves suffer very great inconvenience by having nearly 2500*l.* bills [notes] running on me at this moment, all of which you will have to pay as they come to maturity. I therefore consider it as much your interest to accommodate me, as it is my interest to accommodate you, so that we may gradually work off these heavy obligations."

"Leith, 31st May, 1848.

"I have added at the foot of the account current, a note of the acceptances or promissory notes of mine, &c., to you for bottles to be shipped, running at this time, amounting to 3217*l.* 14*s.* 6*d.*"

The three promissory notes mentioned in the special plea, for the sums of 234*l.* 13*s.*, of 265*l.* 10*s.*, and of 172*l.* 5*s.* 6*d.* were made by William M'Kean in pursuance of the agreement above mentioned, and in all respects in the same manner and subject to the same terms and conditions as the promissory notes previously made by William M'Kean,

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and were not made principally on account of such money as, at the times of making the last-mentioned notes, might have been due from William M'Kean to the plaintiffs in respect of such proceeds of sales as are mentioned in the agreement declared on, or for or on account of such money as might thereafter become payable by him to them in respect of such proceeds of sales; and the sum of 370*l.*, in the declaration mentioned as due to the plaintiff, or any part thereof, was in fact neither covered by the said three notes, nor included in the proceeds of the sales made by William M'Kean without the knowledge or consent of the defendant.

William M'Kean became a bankrupt in May, 1850, previously to the last-mentioned three promissory notes being due, and on their arriving at maturity after the bankruptcy, namely, on the 2nd of June, the 19th of June, and on the 24th of July, 1850, respectively were paid or retired by the plaintiffs.

In May, 1850, at which time William M'Kean ceased to be in the employment of the plaintiffs, he had in his hands sums of money belonging to them, which he had previously received as their agent, and which have not since been paid over to them on their account. William M'Kean was paid a commission at first of one, and afterwards of half per cent. on all promissory notes so made as aforesaid.

In mercantile business conducted by agents in Scotland and elsewhere, great practical difficulty is generally experienced in getting money out of the hands of the agent. One motive of the plaintiffs in requiring William M'Kean to make promissory notes in their favour was to increase their own credit, and to furnish them with funds for the payment of the duties and otherwise; but one motive also was to compel William M'Kean to make a monthly instead of a six monthly account of monies paid into his hands; whilst the motive of William M'Kean in entering into the agreement was to obtain a commission on the amount of such promissory notes.

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The practical effect of the agreement in question was to oblige William M'Kean to retain less money belonging to the plaintiffs in his hands, and to compel him to pay over sums collected by him more promptly and more frequently than he had been in the habit of doing, or was bound by agreement to do, previously to the adoption of the practice. The mode of proceeding in respect of the giving of the promissory notes in question, although not known amongst merchants in Scotland, is not generally practised in that country.

The defendant gave no consent to the agreement and advice above mentioned, of making the promissory notes issued, but considered that William M'Kean would transmit the monies received by him, from time to time, to the plaintiffs through a banker.

The causes of action accrued within six years of the suit; prior to the six years next before its commencement, William M'Kean retained in his hands various sums of money belonging to the plaintiffs, and, contrary to his duty as agent, did not account to the plaintiffs for such sums.

The defendant contended that he was not liable for the sums.

The question for the opinion of the Court was, whether the plaintiffs or the defendant were entitled to recover. By consent of the parties, the Court was to be at liberty to deal with the case in the same manner as if the pleadings had raised the questions capable of being raised upon the facts stated in the case. If the Court should be of opinion that the plaintiffs were entitled to recover, the case was to be referred back to the arbitrator to determine for what amount the verdict was to be entered for them; but if the Court should be of opinion in favour of the defendant, a verdict or nonsuit was to be entered for him as the Court might direct.

The case had been argued in last Michaelmas Term (Nov. 1854), but the Court directed that it should be re-argued.

defendant made no inquiry upon the subject, and lately laid down by this Court, that it is of the creditor to make any communication to the transaction, to the surety: *No Insurance Company v. Lloyd (a)*. Now, as general terms of the guarantee, the plaintiff in making any such reasonable arrangement as they might think fit and convenient for the purpose of carrying on the agency. For the same were also entitled to make any minute alterations of carrying on such business with their agent. It may be contended, that the alteration effected in transmitting to the plaintiffs the money from their agent was prejudicial to the surety, and from all liability under his guarantee. But this does not confine the plaintiffs to any particular mode of transmitting the amounts which might become due from their agent. And it also appears, that in the mercantile usage in such cases, the money is paid every six months; so that the arrangement for transmitting accounts between the plaintiffs and their agent by promissory notes, in fact shortened the time for payment, and that is according to the finding of the Court. Time therefore was not given to the debtors for the arrangement appears to have arisen from a necessity existing, in that character of dealing, to receive money from agents. The defendant there-

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road proposition, that, where a party agrees to become surety for another, and the terms upon which the principal and agent act are altered, the surety is discharged, unless such alteration is expressly provided for and authorised by the agreement. And this proposition is true, although it be not shewn that the surety is prejudiced by the alteration. The agreement must be literally carried out, and no equivalent is allowable: *Whitcher v. Hall* (a). In *Bonar v. Macdonald* (b), Lord Brougham says, "The rule as extracted from the English authorities, *Evans v. Whyte* (c), *Eyre v. Bartrop* (d), *Archer v. Hale* (e), *Whitcher v. Hall*, is, that any variance in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such variance, be substantially performed, will discharge the surety. As to Scotland, in Bell's Principles (f) the rule is laid down, that 'the cautioner is freed by any essential change, consented to by the creditor on the principal obligation or transaction, without the knowledge or consent of the cautioner,' which is supported by the authorities there referred to." With respect to the meaning of the agreement under which the defendant became surety, it is clear, from the terms of the letter of the 4th of January, 1841, written by William M'Kean to the plaintiffs, that the money he should receive on account of the business in which he was to act as their agent, was to be remitted to them at once; the first clause in that letter being, "all monies received for them to be duly accounted for by me, and remitted to you from time to time." It is evident, therefore, that, according to the terms under which William M'Kean was appointed the plaintiffs' agent, he was not

(a) 5 B. & C. 269.

(d) 3 Madd. 221.

(b) 3 H. L. Cas. 226.

(e) 4 Bing. 464.

(c) 5 Bing. 485.

(f) Page 71.

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entitled to retain their money in his hands. The question, then, is, whether that agreement has been altered. The arrangement entered into between the plaintiffs and their agent varied the agreement. The debtor had time given him for the payment of his debt to the plaintiffs. In cases where the agent had become liable on his promissory notes for a larger sum than that which he might have received on account of the plaintiffs, he could not be called upon to pay over such amount to them. Such debts, for which he was responsible to the plaintiffs, did not become due and payable to them according to the terms of the original agreement. The plaintiffs, by such an arrangement, substituted a new agreement in lieu of that entered into by the defendant. And, moreover, the defendant was prejudiced by the mode of carrying on business contrary to the terms of *his* agreement. The promissory notes were, in truth, given by William M'Kean for the accommodation of the plaintiffs, to enable them to raise money to pay the duties. In some instances notes were given by the agent for amounts far exceeding his debts to the plaintiffs, and even beyond the value of the stock received by him and of the outstanding debts. And the defendant is, in fact, sought to

RTIN, B.—After stating the case, his Lordship said, that as of opinion the plaintiffs were entitled to recover (*a*).

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DERSON, B.—In this case I am also of opinion, as I was at the first argument, that the judgment must be for the plaintiffs. This is an action on a guarantee, by the defendant guaranteed as follows:—"I hereby guarantee my brother's, Mr. W. B. M'Kean's, intramissions, as agent in Leith, to the extent of 500*l.* sterling." It appeared, that, on the 4th of January, 1841, a letter had passed between the plaintiffs and the defendant's brother, by which the latter became the plaintiffs' agent on certain specified matters; but as this letter was not communicated to the defendant, it can, I think, have no bearing on the proper construction of the defendant's guarantee, which must be construed according to its plain words without reference to extrinsic facts, for no such facts were within the defendant's knowledge. There is no doubt about the meaning of the word "intramissions," it is found as a fact in the case, that it is signifying "dealings with stock, goods, and cash of capital coming into the hands of an agent, and to be accounted for by the agent to his principal." The guarantee, therefore, expanded is this:—"I hereby guarantee my brother's dealings in stock, &c., as your agent, and his account to you for the same." No particular mode of accounting, except that he must deal as an agent, and no particular mode of accounting for cash received, is specified. The natural conclusion is, that any such dealing and such accounting is guaranteed. Accordingly, we find that the mode of accounting specified in the letter of the 4th of January, 1841, was shortly after changed to six-monthly accounting, which it seems was the mode amongst merchants in similar cases, and it is not doubted that this change was within the guar-

His Lordship stated that during the whole of the argument, not prepared a written statement.
He, as he was not present

intended to be the amount of the expected from the sales of the plaintiff's stock in his such bills should be drawn, one in every sum and that when the first bill became due, it was provided for out of the monthly sales if they were the sum mentioned in the bill, and if not, that the brother should pay that amount, and the plaintiff provide the residue. The effect of this was that of payment of the monies due from the agent, month by month, of the sums received by the agent, at the expiration of the first four months of the contract, and would never cause the agent to pay more than the monies received by him on account. It is this arrangement, it is said, that was the foundation of the contract, that any variation, advantageous or not, I think that does not charge the surety, for it is a material variation of his contract, and he has a right to say, "non est quod iuravi." But where, as here, the contract is that the defendant guarantees any intrusions, the only real question is, are these arrangements?" It seems to me they are. If it were otherwise, I should also say that they are not to the prejudice, but the reverse, to the situation.

re sufficiently before the Court. The first and main question which arises in this case is, what is the meaning of the guarantee given by the defendant? It is an agreement between the plaintiffs and the surety; and whatever the agreement with the surety imports cannot be varied by the plaintiffs. What then is the agreement between the plaintiffs and the surety? If it is a guarantee of the honesty and good conduct of the principal in any particular course of dealing with the plaintiffs, that course of dealing is a part of the agreement of the plaintiffs with the surety, and the plaintiffs cannot alter it and hold the surety liable; and if that be done the surety is discharged, either with respect to the particular circumstances in which the variation takes place, or altogether temporarily or permanently according to the nature of the variation. But if the course of dealing is left to the option of the plaintiffs, entirely or within certain limits, the variation of the course of dealing, entirely or within those limits, is allowed by the contract itself, and the surety cannot complain of a variation which he has himself agreed to by the original contract. Now this guarantee must be interpreted according to the ordinary meaning of the words used in it, and with reference to the facts in evidence which are admissible to aid in the construction.

These facts are, that it was sent to the defendant by his brother, who had already been appointed agent to the plaintiffs under a promise to obtain a guarantee from the defendant, and was in the form drawn out by the plaintiffs, and sent in a letter to the defendant's brother, which letter was the only fact found to be known to the defendant besides the guarantee itself.

From these two documents the defendant knew that the plaintiffs were bottle manufacturers, and that the defendant's brother was to be appointed their agent; that the defendant's guarantee was a necessary condition of the brother's being appointed such agent to them; but he did

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them. What, then, is the construction of the terms? The terms are, "I hereby agree to guarantee Mr. W. B. M'Kean's, *intromissions*, as your agent at Leith, to the extent of 500*l.* sterling; and I am your obedient servant, H. M'Kean. To M'Kean and Co., bottle manufacturers, Glass-works, the term *intromissions* is explained in the case. It is partly legal, partly mercantile, and signifies stock, goods, and cash of a principal coming into the hands of an agent, and to be accounted for by the agent to the principal. The meaning, then, of the guarantee is, that in my mind, and may be expressed thus:—"In consequence of my employing my brother as your agent at Leith, as bottle manufacturers, I guarantee him in his dealings with you, that all goods, and cash coming to his hands as such agent, are to be accounted for by him to you in the manner in which you may direct." For there is not a fixed mode of accounting according to that which is adopted between them, or any other *fixed plan*; it leaves the mode of accounting open, and the principal and employer alone is to regulate that, within reasonable limits; or as the principal and agent may agree in their employment as agent in the sale of bottles, that the faithful performance of the duty of the agent shall be the employment. Had it been material in the case, it might have been material in the defendant to be liable only for the *then mode*

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I never inquired about it, nor even knew that his brother had been employed at all as agent before the date of the warrant. Such being, in my opinion, the true construction of the written contract, the alteration in the mode of accounting, (if it was one), by the first agreement made after commencement of the agency or by the second, is altogether immaterial. It is no violation of the agreement with the defendant, the surety, for there was no engagement to the defendant that the accounting should be in any particular mode or at any time. The plaintiffs alone were to regulate that, in whatever way they chose to conduct their business with their agent and the agent assented to,—if to insist on payment in a month or six months of the monies received, if to pay in cash or bills drawn and accepted by others or by himself, if they wished him to demand his own acceptance and to apply the proceeds to the payment of it, is wholly immaterial, because there is no violation by the surety, and consequently no obligation on him on the part of the plaintiffs, that any particular mode of paying or accounting should be adopted. If the warrant had expressly or impliedly stated that the surety was to be responsible only for intrusions of the agent in *the mode then used*, any deviation from that plan would have discharged the surety as to the transaction in which the variation took place. I think the last agreement, being a deviation from that plan, would have had that effect if it could be construed to authorise the agent to *keep the monies* in his hands till the bills were due in order to satisfy them, for that would be to give time to the surety by the binding agreement, and so would be a variation in the contract with the surety, and so would discharge him from liability for those sums, but for those only; and I rather think such was the effect of the last agreement.

If the case turned upon this point, it would be a matter of fact to be inquired into, what part of the sums received by the agent were actually kept back in that way. But as

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I think the surety, the defendant, is not to be considered as having stipulated for any *particular mode of carrying on the agency business*, the defendant is not discharged by any of the alterations which were made in this case. They were still in an *agency* account. But if the agency account had been entirely at an end, and the principal employed *only* as an accommodation drawer, doubtless the defendant would not have been responsible for the principal in that character; but the superadded practice of giving notes for the plaintiffs' accommodation, accompanied by a direction to apply the monies received as agent to those payments, does not destroy the agency account any more than if the plaintiffs had agreed with the agent to be jointly concerned with him or to employ him in another mode. The defendant is still responsible only for the sums received for bottles sold by the agent as such, which is within the intrusions mentioned in the guarantee itself, and for the due application of those sums as directed by the plaintiffs; but he is not made in any way responsible for the drawing account as such, or for the due payment of the bills for which he has not received the full amount by sales of bottles, or for the application of sums sent to him by the

iffs and William M'Kean, (the person whose conduct was guaranteed), was originally a mere agency; he was to receive goods, (glass bottles), sell them, and account to the plaintiffs for the proceeds. This agency account was afterwards, by contract between the principals and the agent, turned into a regular accommodation drawing account, which continued for eight or nine years, for which the agent received a commission, and put his name to bills and notes to an amount far beyond the goods he had to dispose of, and ultimately, (as might be expected from such dealings), he became a bankrupt, with some proceeds of the plaintiffs' goods in his hands not paid over, to recover which the action is brought. There is no difficulty about any question of pleading, inasmuch as the Court is at liberty to deal with the case in the same manner as if the pleadings had raised any questions capable of being raised upon the facts stated; and as this is not a special verdict, but a special case, the Court is entitled to take notice of any conclusion of fact which necessarily, or indeed reasonably, follows from what is found in the case.

The offer by William M'Kean to the plaintiffs, to act as their agent, and to give security by his brother, Hugh M'Kean, the present defendant, was dated the 4th January, 1841; the guarantee itself was dated the 11th January, 1841. For the purpose of discussing the matter, I will suppose that the application had been made to the defendant to become security not in 1841, (but seven years after), namely in 1848, (which might have been in substitution of another surety deceased), and that the guarantee made by the defendant to the plaintiffs was in the form in which we now find it. Now it appears to me that the dealings between the plaintiffs and William M'Kean could not at that time, fairly and truly, and indeed scarcely without fraud, be described as "*an agency account for the sale of glass bottles.*" It was something far beyond, and

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very different from that; it had become not accidentally or occasionally, but by *contract and agreement* between the plaintiffs and William M'Kean, a regular accommodation drawing account with a commission of 1 per cent. at first, and afterwards (I presume as the transactions increased,) half per cent. on all acceptances or notes which were in part given upon sales effected or expected to be made, but in much greater part merely to accommodate the plaintiffs, and to enable them by discounting the bills or notes, (which of course purported to be drawn for value), in order to raise money to pay duties, (there being then a duty on the manufacture of glass bottles); and it is found as a fact in the case, "*that these accommodation bills or notes were made without reference to the amount of stock received by William M'Kean for sale, or to the amount of sales actually made, or to outstanding debts, or the proceeds of sales actually collected;*" and it generally happened that bills or notes were made to the extent of between 300*l.* and 500*l.*, and sometimes to the extent of 800*l.* and 900*l.* over and above the value and amount of all the stock, outstanding debts and proceeds altogether; and there can be no doubt from the agreement and the correspondence that this

Campbell, C. J., in the case of *Hamilton v. Watson* (a), appears to me correctly to point out what ought to be communicated in such a case. Lord *Campbell*, C. J., says, "I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that the position shall be different from that which the surety might naturally expect." Now no one guaranteeing an agency for the sale of bottles was, in my judgment, bound to anticipate, expect, or calculate upon the state of things which really existed, namely, that there was an accommodation drawing account mixed up with the agency account, going far beyond not only the proceeds realised, or the goods sold, but beyond all the goods consigned to the agent, the excess (for which there was no security) being nearly double the amount of the liability of the surety. In the case supposed, I am of opinion that the defendant would not have been liable; and I think there is no difference in principle between that case and the present, that those circumstances which a person obtaining a guarantee is bound to communicate, if they exist at the time the guarantee is given, he is equally bound, in my judgment, to communicate if they arise after the guarantee has been given.

If it be asked, in what respect was this accommodation drawing account injurious to the surety, my answer will be, first, the agent must, I think, be considered as creating a lien on the goods and money in his hands, to the extent of the accommodation acceptances, and should not be called on to pay the proceeds as long as these bills were outstanding, at least until they were reduced below the sum due from the agent to the principal,

(a) 12 Cl. & F. 109.

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case were we, in the judgments of my learned
consider these accommodation bills merely as
taining payment of what might be due. If
it is not a mere mode of payment,—another
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very mischievous one. But secondly, the
liable to a large amount, not only beyond
sold, but beyond all the goods intrusted to him
event of the total failure of the principals (the
agent might have been stripped of the means
what was really due for goods actually sold,
liable for so much more than he had received
for, and then the surety might have been
make good that deficiency. Thirdly, the
an interest, in consequence of this being an
account, and not merely an agency account,
dealings, in order to raise money for the
notwithstanding the default of the agent as
account for sums received merely as agent;
not to act fairly, honestly, and openly, checked
when they discovered it, but to overlook
the agent, in consideration of the benefit to
the accommodation acceptor of the bills and
notes, and accordingly this very fact occu-
pressly found in the case, that “prior to the
before the commencement of the action, the
retained in his own hands various sums of

the system of accommodation from which they derived the means of raising money? and what right had they (without the surety's consent,) to turn the agency account into an accommodation account, leading as it might (and in fact as it did) to such results? Lastly, every mercantile man, indeed every man, has a right to exercise his own judgment, whether he will guarantee the real transactions of a person whose real dealings are mixed up with and involved to a much larger extent in fictitious bills and notes than the real transactions, such fictitious bills and notes being created for the mere purpose of raising money by discount. It is notorious that the Bank of England will not discount such securities, or rather "*paper*," nor will they (it is understood,) discount the bills of persons who have ever imposed upon them by procuring the discount of such bills or notes; and most bankers act upon similar principles.

In the correspondence before us, the agent, in the letter of the 3rd of July, 1843, writing to the plaintiffs, points out that he cannot get his own promissory notes discounted, that is, they must be discounted, or procured to be discounted by the plaintiffs; they must appear to be for value, for real transactions, or no one would meddle with them. Transactions of this sort, when continued systematically for years, usually terminate (as they have done in this case) in the bankruptcy of some or all of the parties. As part of a system, they are essentially fraudulent; they impose upon the world documents which profess to be what they are not; and if the truth were told about them, they would fail to produce the object the parties have in view; and I repeat, a surety has a right to exercise his own judgment and discretion, whether he will be a surety for real transactions that are so mixed up with unreal transactions, which (though possibly venial when occurring only once or but occasionally), when they form part of a regular systematic course of business for raising money during many years together, are, in my judgment, and I believe in

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that of the bulk of the honest and intelligent part of the community, deceptive, fraudulent, and ultimately (as they deserve to be,) ruinous. On the ground, therefore, that a mode of dealing between the principal and the agent was subsequently adopted, which the surety was not bound to expect or calculate upon, and which might have been and was prejudicial to the surety, I think the defendant is entitled to our judgment; but as the majority of the Court is of a different opinion, the judgment must be for the plaintiffs.

Judgment for the plaintiffs

Jan. 29.

OSBORN v. THE LONDON DOCK COMPANY.

On an application to the Court for leave to deliver interrogatories in writing to the opposite party in the cause, under the 51st section of the Common Law Procedure Act of 1854, 17 & 18 Vict. c. 125, the affidavit of the attorney of the party sought to be interrogated, that he believes that the questions proposed

will criminate his client, is no answer to the application. Such objection ought to be made by the party himself when he has been sworn.

Quære, whether a witness, to entitle himself to object to a question, on the ground that it has a tendency to criminate him, is bound to satisfy the Court that such will be its effect, or whether he is himself the sole judge of its effect.

WILLES moved for a rule calling on the plaintiff to shew cause why the defendant should not be at liberty to deliver to him the interrogatories in writing hereinafter mentioned, under the 51st section of the 17 & 18 Vict. c. 125.—The declaration contained three counts. The first count was in detinue for certain pipes of wine and casks. The second count was trover for the same; and the third count stated that the plaintiff delivered certain pipes of wine and casks, &c., to be kept by the defendants for reward in that behalf, and alleged, as a breach, the loss of the same by the carelessness and negligence of the defendants. The defendants pleaded the general issue to each of the counts respectively, and to the first and second counts a

of the goods being the plaintiffs; and to the third reverse of the delivery and acceptance of the goods as alleged. The plaintiff, in his particulars of demand, claimed to recover two parcels of red wine, consisting of 860 gallons, respectively vatted in the months of September, 1854. The interrogatories now sought to be served to the plaintiff were 159 in number. The

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the interrogatories was to shew that the defendant had a defence to the action, on the ground that certain fraudulent practices had been resorted to with reference to the goods, by the fraudulent substitution of other wines; or to third parties in the place of those which had been deposited by the plaintiff with the defendants, and that the plaintiff himself was a party to the fraud. The defence was founded upon an affidavit, as required by section of the 17 & 18 Vict. c. 125; and was opposed by an affidavit made by the plaintiff's attorney, on the first, that the deponent believed that if the plaintiff persisted in such fraudulent practices as those sought to be established by the answers to the interrogatories, the defendant would be liable to be indicted for the same; secondly, that the evidence so sought to be obtained was immaterial to the issues in the action; and thirdly, that the judge, in his discretion, ought not to allow the same. The case came before Alderson, B., at Chambers, who refused the matter to the Court.

in support of the motion.—The defendants seek, by the means of these interrogatories, to obtain evidence to shew that the wines which the plaintiff claims to be his, are not those which were deposited by him with the defendants. The interrogatories raise questions material to the issues; and although the tendency of the questions is to criminate the plaintiff, yet the mere affidavit of the plaintiff's attorney that they will have such effect, is no answer to the objection. The objection is premature. [*Parke, B.*

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that the answer to the question proposed has
effect of criminating the witness. In *Fisher v.*
Jervis, C. J., and *Maule*, J., expressed the
the witness was entitled to judge for him
the question had such a tendency. There
several cases in which an opposite opinion
pressed. In *Short v. Mercier* (b), Lord *Truro*,
“A defendant, in order to entitle himself to
not bound to shew to what extent the disc
may affect him, for to do that he might
necessity deprive himself of the benefit he is
it will satisfy the rule if he states circumstanc
on the face of them with the existence of the
and which also render it extremely probable.”
upon this point are collected in a very able
evidence, where it is said, “whether a qu
tendency to elicit a criminative answer, must
by the Court, as otherwise under pretence o
nating himself a witness might easily evade giv
dence.”—Best on Evidence, 2nd Edit., page 162
—In 2 Phillipps on Evidence, 10th Edit., pag
said: “It is the province of the Court to decid
proposed question has a tendency to crimina
and it is the duty of the Court, while it protect
in the due exercise of its privilege, to take care
not, under a pretence of defending himself, s
from iustice, or withhold evidence which he

m(a), of Lord *Loughborough*, L. C., in *Chambers v. Person(b)*, and of an American Court, in *The People v. Person(c)*. These authorities cast some doubt upon the view of *Jervis*, C. J., and *Maule*, J., in *Fisher v. Ronaldson*. *n, B.*—On the other hand, there is great difficulty where the limit is to be drawn; for, if the Court decide improperly that a question may be put, irre-injustice might be done to the witness. Suppose, now, a witness were asked whether he was in the room of two other persons at a particular place at a particular hour? That seems a very innocent question, and an answer might lead to the conviction of the witness of a very serious crime. The witness may know the answer to the question, and upon that ground he may refuse to answer it, although the Court may be totally ignorant of the answer. *Parke*, B.—The weight of the authorities seems in favour of the rule which requires the witness to answer the question. It is the opinion of the majority of the Judges in *the case(d)*. *Alderson*, B.—We have lately decided, in *Boyle v. Wiseman(e)*. If the questions now to be put to the plaintiff are material to the issues in dispute, it lies upon him to shew that he has some defence which exempts him from answering them.] The defence must come from the plaintiff himself after he has sworn. The affidavit of a defendant's attorney, that the facts stated have a tendency to criminate his client, is no defence to a bill of discovery filed in a Court of Equity.

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ice shewed cause in the first instance.—It is shewn that, if these interrogatories furnish evidence in

manst. 203.

no. C. C. 433.

and. N. Y. Rep. 253.

(*d*) 1 Den. C. C. 236.

(*e*) *Ante*, p. 647.

of interrogatories, under the 51st section of the Act of 1852, is confined to cases where a bill of discovery has been obtained in a Court of Equity. The 50th section, which empowers the Court to order the production of documents, says, that it shall be upon the affidavit of the party applying for the production of which he is entitled for discovery or otherwise." And the 51st section says, that the party may be interrogated "upon any matter as to which discovery may be sought." It does not say that the power is limited to cases in which "a bill of discovery has been obtained." *Alderson, B.*—The proceeding is an examination of a witness at the trial. The rule is, that the same rules should be followed in the examination of a witness in Court, as in the examination of a witness at the trial. The plaintiff must be put on his oath, and any question pinch him, he must object to it. The examination of a witness in Court, is under the power of the Judge. These interrogatories, which have to be put to the plaintiff, would elicit any

whether he will answer the questions. If the plaintiff should refuse to answer any of the interrogatories without just cause, then the Court or a Judge is empowered, under the 53rd section, to direct an oral examination of the plaintiff, upon such points as they may direct, before a Judge or Master. And after the plaintiff has been sworn before a Judge or Master, and a question is put to him which he believes has a tendency to criminate him, he may then object to it on that ground; and if the law be that laid down in *Fisher v. Ronalds*, his bare statement that the question has such effect, will be a sufficient objection to the question. But the mere affidavit of his attorney is not sufficient. The system introduced by this statute is an improvement upon the method of proceeding by bill of discovery.] The interrogatories are, from their number, embarrassing to the plaintiff. [*Alderson*, B.—We will strike out such as are shewn to be immaterial.] The plaintiff wishes it to be understood that the objection to the interrogatories does not come from him, but that it is made by his legal adviser. [*Alderson*, B.—For that reason the objection is not good, as it ought to come from the witness himself]

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PER CURIAM(a).—The rule must be absolute.

Rule absoluta.

(a) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Martin*, B.

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Jun. 29.

THÖL v. LEASE.

The plaintiff instructed the defendant, a broker, to purchase certain goods for him. The defendant accordingly, professing to have bought the goods as a broker, delivered a bought note to the plaintiff—“Bought by order and for account of T. & Co. (the plaintiff), from principal, 102 barrels of raisins, &c.” The plaintiff paid to the defendant the purchase money, and received from him a delivery warrant for the goods; but, upon the plaintiff's presenting it to the wharfingers holding the goods, they refused to deliver them, on the ground that the warrant was fictitious. In an action for money had and received to recover back the money so paid, the Court allowed the plaintiff to deliver interrogatories to the defendant, under the 51st section of the 17 & 18 Vict. c. 125, requiring him to answer, whether he acted in the transaction as principal or agent, and, if as agent, to name his principal.

WILLES had obtained a rule^(a) calling on the defendant to shew cause why the plaintiff should not be at liberty to deliver to him the interrogatories in writing hereinafter mentioned, under the 17 & 18 Vict. c. 125, s. 51.

The first count of the declaration was for money had and received by the defendant for the use of the plaintiff. The second count was for the non-delivery, by the defendant to the plaintiff, of 102 barrels of raisins bought by the plaintiff from the defendant. The defendant pleaded to the first count, never indebted; to the second count; first, non assumpsit; and secondly, that the defendant did deliver the raisins. Upon these pleas issues were joined.

It appeared that the plaintiff had instructed the defendant, as a broker, to purchase for him 102 barrels of raisins. The defendant professed to make the purchase in pursuance of the instruction, and delivered to the plaintiff the following bought note.

“London, Sep. 10, 1853.

“Bought by order and for account of Messrs. J. P. Thöl & Co., from principal, 102 barrels raisins, at 42s. per cwt., duty paid, ex Haddington, customary allowances, prompt two months, payment Saturday after delivery allowing interest at 5 per cent. per annum to 12th November. Discount 1.

“Your obt. Servt.

“WM. LEASE.”

The plaintiff paid to the defendant the sum of 567l.

(a) Upon moving for the rule, first instance; but the Court said that it was only a rule nisi. the learned counsel suggested that the rule was absolute in the

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the amount of the purchase money, on the 12th of November, and the defendant then gave to the plaintiff a delivery warrant, in which the raisins were described as deliverable to the defendant or his assigns by indorsement. This instrument was indorsed by the defendant to the plaintiff, but upon the plaintiff's presenting it to the bankers they refused to deliver the raisins, on the ground that the warrant was fictitious. No reference was made to any principal except such as was contained in the bought note. The present action was brought to recover back the purchase money so paid to the defendant; and the defendant having been required to communicate the name of his principal, and having refused to do so, a summons was taken out before *Parke, B.*, at Chambers, for leave to deliver to the defendant the following interrogatories, upon an affidavit, in which the plaintiff deposed that he believed that the defendant had no real principal, and that it was material to him to discover whether the defendant had any real principal in the transaction.

1st. Whether the defendant entered into the contract in the declaration as principal or agent?

2ndly. If as agent, for whom and by what authority?

3rdly. If any entries in the defendant's books shewing who was the principal in that transaction, and if he has any entry in his contract book to that effect?

4thly. If any money paid to him in respect of the contract in the declaration has been paid over to such principal, and when, and how?

5thly. If he has any entry in his pass-book, or other book or books, shewing such payment?

On the hearing of the summons, *Parke, B.*, had refused to make any order, apparently on the ground that he thought that the application was made for some collateral purpose.

J. Sharpe shewed cause.—There are two objections to

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this application.—First. It is submitted, that, according to the rules observed by Courts of Equity in granting a discovery, the questions proposed could not be put to the defendant. In *Martin v. Hemming (a)*, this Court abstained from deciding whether the “discovery” mentioned in the 51st section of the 17 & 18 Vict. c. 125, is limited to cases in which a bill of discovery could be maintained; but it is submitted that the same rules apply to both forms of proceeding. Now it is an established rule in equity, that “the right of a plaintiff in equity to the benefit of the defendant’s oath is limited to a discovery of such material facts as relate to the *plaintiff’s case*, and does not extend to a discovery of the manner in which the *defendant’s case* is to be established, or to evidence which relates exclusively to his case:” Wigram on Discov. 261. [*Martin, B.*—The plaintiff seeks to establish his own case. He alleges that the defendant falsely represented to him that he sold these goods as the agent of a third party, whereas in fact there was no such party. If that be so, the plaintiff is entitled to recover back the money he has paid to the defendant under the count for money had and received.]—Secondly. The plaintiff, having employed

vidence sought to be obtained is most material to the plaintiff's case.

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PER CURIAM (a).—The rule must be absolute.

Rule absolute.

(a) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Martin*, B.

MORETON v. HOLT.

Jan. 26.

USH had obtained a rule, calling on the plaintiff to shew why an order of *Martin*, B., made in this case, should be rescinded, and why the execution should not be set aside, and the defendant discharged out of custody.

The action was brought in a county court, and judgment was given for the plaintiff. Execution against the goods and chattels of the defendant was issued out of the county court, which execution however proved ineffectual, and consequently an order was made by *Martin*, B., for the removal of the judgment into this Court, and for execution thereon. A writ of *ca. sa.* had accordingly been issued, under which the defendant was now in custody. The rule was obtained on the ground that a judgment of a county court cannot be removed into a superior Court for the purposes of execution thereon.

A judgment of a county court is not removeable into a superior Court. The 19 Geo. 3, c. 70, and 1 & 2 Vict. c. 110, by which the judgments of inferior Courts of record were removeable into the superior Courts, have no application to the judgments of county courts.

Griffiths shewed cause.—This order is good under two statutes, and is also supported by a decision of this Court. The 19 Geo. 3, c. 70, s. 4, enacts, "That, in all cases where a judgment shall be obtained in any action or suit in any inferior court of record, it shall and may be lawful to and for any of his Majesty's Courts of record at Westminster, upon affidavit made and filed therein of such judg-

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ment being obtained, and of diligent search and inquiry having been made after the person or persons of the defendant or defendants, or his, her, or their effects, and of execution having issued against the person or persons, or effects, as the case may be, of the defendant or defendants, and that the person or persons, or effects, of the defendant or defendants are not to be found within the jurisdiction of such inferior court, which affidavit may be made before a Judge or Commissioner authorised to take affidavits, and such superior Court, to cause the record of the said judgment to be removed into such superior Court, to issue writs of execution thereupon, &c., against the person or persons, or effects, of the defendant or defendants, in the same manner as upon judgments obtained in the said Courts at Westminster, &c." The 1 & 2 Vict. c. 110, s. 22, enacts, that, "In all cases where final judgment shall be obtained in any action or suit in any inferior court of record, in which at the time of passing of this Act a barrister of not less than seven years standing shall act as judge, assessor, or assistant in the trial of causes, &c., it shall be lawful for the Judges of any of her Majesty's superior Courts of record at Westminster, &c., or for any Judge of any of the said Courts at Chambers, &c., upon the application of any person who at the time of the commencement of this Act shall have recovered, or who shall at any time thereafter recover such judgment, &c., and upon the production of the record of such judgment, &c., to order and direct the judgment, &c., of such inferior court to be removed into the said superior Court, &c., and immediately thereupon such judgment, &c., shall be of the same force, charge, and effect as a judgment recovered in &c. such superior Court, and all proceedings shall and may be immediately had and taken thereupon, or by reason and in consequence thereof as if such judgment so recovered, &c., had been originally recovered in &c. the said superior Court, &c."—[*Parke, B.*—Those statutes were intended to apply to inferior Courts, the proceedings in which

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ffered essentially from those which exist in the present county courts. No action lies on the judgment of a county court; error cannot be brought on it, and execution against the person cannot be issued except by the intervention of the Judge himself. This appears from the case of *Berkeley Elderkin* (a), which was followed by this Court in *Austin Mills* (b). The reasons are clearly stated in the judgment of Lord Campbell, C. J., in the former case, where he says: "Prima facie an action lies on the judgment of every court of competent jurisdiction; but I think it quite clear, when we look at the provisions of the stat. 9 & 10 Vict. c. 95, that the intention of the Legislature was to confine the remedy on the judgments of Courts constituted under that Act to the remedies specifically provided in the Act. The policy of the Act was to give an easy and cheap remedy for the recovery of small debts. The intention of the Legislature will be entirely defeated, if the creditor is at liberty to adopt this course. The Act provides special remedies for enforcing the judgment, both as against the property and as against the person of the debtor. As to his property, it is in part protected from execution; for sect. 96 excepts wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of £5, which shall, to that extent, be protected from such seizure.' That protection would be entirely lost if this action were maintainable, for on the judgment in the superior court a fi. fa. may issue, under which the tools of the trade of the debtor must be taken and sold by the sheriff; and so the debtor would be deprived of the means of earning his bread, reserved to him by the County Court Act. Again, as to the debtor's person: He can be imprisoned under the Act only for forty days; and then, it is not by way of execution, but as a punishment for contempt. But if this action lies, it may be taken in execution exactly as if the creditor had

(a) 1 E. & B. 805.

(b) 9 Exch. 288.

Further, an action can be maintained on a final judgment only, not on an interlocutory one. Now sect. 10 of the Act of 1843 says, "it shall be lawful for the Judge of any County Court, when such summons shall be heard, if he shall think fit, to order or not he shall make any order for the committal of the defendant, to rescind or alter any order that shall have been previously made against any defendant, so sum him, for the payment, by instalments or otherwise, of the debt or damages recovered, and to make any other order, either for the payment of the debt or damages and costs forthwith, or by annuity, or in any other manner as such Judge may think fit, able and just." This shews that there is no finality in the nature of a final judgment in the county court, and that it has still jurisdiction over this very judgment when an action is brought. He might now rescind or alter the order, or make a new order to pay by instalments, or otherwise, at any time. That power given to the Judge would destroy the finality of the action lay. These considerations are sufficient to shew that the Legislature did not intend this action to be maintained." That is a decisive authority against the proposition. *Alderson, B.*—The section relied upon is the 22nd sect. of the 1 & 2 Vict. c. 11, which gives to the judge of the court to which that enactment is applicable as "a barrister of not less than five years standing." Now, we know that many of the county courts were attorneys.—[*Lush* referred

motion, writ of error, certiorari, or otherwise, into any other Court whatever, save and except in the manner and according to the provisions hereinbefore provided."—[*Parke*, B.—If this mode of proceeding were allowed, it would completely destroy the protection which the statute affords to a party against whom a judgment is pronounced in the county court.] In *Copeman v. Gladden* (a), a judgment of a county court was removed by leave of this Court, and there the defendant had already suffered forty days imprisonment, under an order of commitment. [*Pollock*, C. B.—That motion was not opposed, and the case ought not to have been reported.]

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Lush was not called upon to support the rule.

PER CURIAM (b).—The rule must be absolute, with costs, upon the condition that no action be brought.

Rule absolute accordingly.

(a) 15 Jur. 90.

(b) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Martin*, B.

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Jan. 30.

FORSHAW and Another *v.* LEWIS and Cox.

An application, under the 50th section of "The Common Law Procedure Act, 1854," for the discovery of documents, may be made before plea pleaded.

It is no answer to the application, that the documents are such as the party is privileged from producing: if that be so, the fact may be shewn in the affidavit to be made in obedience to the rule.

THIS was a rule calling on the plaintiffs to shew cause why they should not, within ten days, answer on affidavit, stating what documents they have in their possession or power relating to the matters in dispute in this cause, or what they know as to the custody they, or any of them, are in; and whether they object, and if so on what grounds, to the production of such as are in their possession, control, or power (*a*).

The rule was obtained before plea pleaded, and was founded on an affidavit of the defendant Cox, which stated that the action was brought to recover the amount of a bill of costs for business alleged to have been done by the plaintiffs in connection with an election for members of Parliament for the town of Derby. That at such election the plaintiffs were retained as solicitors or agents for T. B. Horsfall, of Liverpool, who was returned as one of such members, but was afterwards unseated for bribery by

(*a*) The 50th section of the Act requires that the name of the person to be named of such body

agents. That the deponent never retained the plaintiffs or either of them, or instructed them to do or transact any of the business so alleged to be done, nor did he in any manner become responsible for the same; and that he is advised and verily believes that he has a good defence to the action upon the merits. That the deponent verily believes that the plaintiffs, or one of them, have or hath in their or his possession or power several documents, to the production of which he is entitled for the purpose of discovery or otherwise; and that such documents consist of the drafts or copies of divers bills of costs, charges, and expenses relating to such election and petition to Parliament consequent thereon, delivered by the plaintiffs to the said T. B. Horsfall, and for which this action is brought; and also sundry book or books of account, wherein is written or entered the particulars of all, or some part or parts, of the aforesaid bills of costs or either of them; and also divers others written and sent to the plaintiffs, or one of them, from the said T. B. Horsfall, and also from G. H. Horsfall and R. Horsfall, both of Liverpool, and from the other defendant J. Lewis, and from J. B. Simpson, of Derby, solicitor; and also copies of divers letters written by the plaintiffs, or one of them, to the said T. B. Horsfall, G. H. Horsfall, R. Horsfall, J. Lewis, and J. B. Simpson, or some or one of them, of and relating to some or one or more of the matters connected with the said election, or consequent hereon. The discovery of which said documents is material and necessary to this deponent's defence of this action. That this application for the discovery thereof is made bona fide and not for the purpose of any delay whatsoever.

The affidavit of the plaintiff Forshaw, in answer, stated that, at the election in question, T. B. Horsfall and M. T. Bass were respectively candidates, the former on the conservative and the latter on the liberal interest; that both were returned as members for the borough. That a peti-

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tion was presented on behalf of certain persons in the liberal interest in Derby against the return of T. B. Horsfall; and another petition was presented on behalf of certain persons in the conservative interest against the return of M. T. Bass; that both petitions were prosecuted before the House of Commons. That the plaintiffs were retained by T. B. Horsfall to act and did act as attornies and solicitors on his behalf in the matter of the petition against him, but were not retained by him or on his behalf, nor did they act upon any retainer by him or on his behalf in the matter of the petition against M. T. Bass, in opposition to his return. That the plaintiffs have by this action asserted, and do verily believe, that they were retained to act and did act in the matter of the last-mentioned petition by and on behalf of the defendants; that the plaintiffs did afterwards deliver to T. B. Horsfall divers bills of costs, charges, and expenses, and work and labour done and incurred by them on his behalf, in matters relating to the said election and petition against the return of T. B. Horsfall; but that the plaintiffs did not at any time deliver or cause to be delivered to T. B. Horsfall, or to any one on his behalf, any bill or bills of any costs, charges, or expenses, or any work or labour incurred or done, in respect of the said petition against the return of the said M. T. Bass, or of any costs, charges, expenses, work or labour, or of any matter or thing for which this action is brought; and the plaintiffs have not, and never had or made out any draft or copy of bill or bills of any costs, charges, or expenses, or work or labour, or any matter or thing for which this action is brought, which bill or bills was or were delivered or to be delivered to the said T. B. Horsfall; and that the plaintiffs have not any book or books of account, or otherwise, wherein is written any cost, charge or expense, or any item for work or labour, or any particular of any cost, charge or expense, or of any item for work or labour, for which this action is brought, and for which at any time any bill or

bills of costs was or were delivered or to be delivered to the said T. B. Horsfall, or wherein any costs, charges, expense, work or labour, or any particular of any cost, charges, expense, work or labour for which this action is brought, is in any way charged to the account of, or against the credit of the said T. B. Horsfall; and that the whole of the costs, charges and expenses, work and labour sued for in this action are costs, charges, expenses, work and labour done and incurred by the plaintiffs solely in and about the said petition against the return of the said M. T. Bass.—The affidavit then set out the special indorsement on the writ, from which it appeared that the plaintiffs' claim was for costs and charges relating to matters connected with the petition against the return of M. T. Bass for the borough of Derby.

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Brett shewed cause.—First, the application is premature. A defendant is not entitled to a discovery *before plea*, unless under special circumstances, as for instance where he establishes a case of extreme urgency: *Martin v. Hemming*(a); and that is not done here.—Secondly, the affidavit in which the rule was obtained is answered in fact. It is shewn by the plaintiffs' affidavit, that the action is not brought in respect of business done by the plaintiffs as solicitors for Horsfall in the matter of the petition against his return, but for business done in and about the petition against the return of Bass; and that the plaintiffs have not delivered to Horsfall any bills of costs, nor have they any books containing entries of charges against him in respect of that matter. Moreover the bills of costs and letters are privileged communications. [*Parke, B.*—There was a case at *Nisi Prius* where evidence of the retainer of counsel was rejected as a privileged communication; but that cannot be law, for anything which merely shews the

(a) Ante, p. 478.

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relation then existing, and does not disclose confidential matter, is admissible. As to whether these letters are privileged depends on their contents. The defendants are entitled to any letters which merely shew a retainer, but not to letters which are confidential between attorney and client. The practice in the Court of Chancery is to seal up that part of a document which is inadmissible.]

The Court then called on

Lush to support the rule.—*Martin v. Hemming* was decided on the 51st section of the statute, which enables the parties to deliver written interrogatories to each other, and which points out the time at which they are to be delivered. [*Parke, B.*—The reason for that decision does not apply here. There it was held, that, inasmuch as the Legislature fixed the time for proceeding, some special ground must be laid for coming earlier.] Then the question is, whether the defendants have shewn sufficient to entitle them to call on the plaintiffs to state what documents they have in their possession or power relating to the matters in dispute, and whether they object to produce them, and if so, upon what grounds. It is submitted that they have. The defendants'

red except as to the letters: and discharge as to them the rule will be absolute. If the plaintiffs are prevented from producing any particular letter they must shew the affidavit to be made in accordance with the rule.

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Rule absolute as to letters or copies of letters written or sent by the plaintiffs or any of them to T. B. Horsfall or to any other of the parties mentioned in the affidavit and also as to letters received from T. B. Horsfall and from any other parties in the affidavit and discharged as to the residue.

FORBES and Others v. SMITH.

Jan 30.

was a rule calling on the plaintiffs to shew cause why a writ of summons and all subsequent proceedings should not be set aside, on the ground that the writ was served upon the defendant, and the cause of action arose within the jurisdiction of the Court, or was in respect of a contract made beyond the jurisdiction of the

A British subject residing in France was there served with a writ of summons in the form prescribed by the 18th section of "The Common Law Procedure Act, 1852." The writ was specially indorsed with a claim in respect of promissory notes made abroad. The defendant appeared to the writ, and, after declaration, found that the cause of action did not arise within the

the 9th of September, 1854. the defendant was at Passy, in the empire of France, with a copy of a the form prescribed by the 18th section of "The Common Law Procedure Act, 1852." The writ was specially indorsed as follows:—

July, 1847.—To six promissory notes of this date lawfully made by defendant, one of the members of the Bank of Calcutta, for payment respectively at sixty

on of the Court, and was not in respect of the breach of a contract made within the jurisdiction of the Court, whereupon he applied to set aside the writ and proceedings under it:—*Held*, that there was no irregularity in the writ itself; and that the defendant, by appearing, had submitted to the jurisdiction of the Court.

In this case, the defendant should apply to a Judge for particulars before appearance.

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days sight, of 10,000 Company's rupees, equal to 10,000 sterling each, to Cockerell, Larpent & Co., and by them indorsed to the plaintiffs; and interest thereon respectively at 5*l.* per cent. from 6th January, 1848, until payment."

On the 21st of September, 1854, the defendant appeared to the action, and on the 29th of December the plaintiffs delivered a declaration. On the 6th of January, 1855, the defendant obtained an order to inspect and take copies of the promissory notes, and on the 25th of January the present rule was obtained. The application was supported by an affidavit of the defendant, which stated, that, until after the inspection of the promissory notes, he was not aware of the real nature of the cause of action, or of the nature of the notes. That the notes were in the following form:—

" Union Bank Post Bills.

" No. 445.

" Calcutta, 1st July, 1847.

" Co's Rs 10,000.

" At sixty days after sight of this our first bill of exchange (second and third of same tenor and date not paid). We promise to pay on account of the proprietors of the Union Bank of Calcutta, to the order of Messrs. Cockerell,

cutta in the East Indies, and were delivered to Messrs. Cockerell, Larpent & Company at Calcutta; but that the defendant, never having had any notice of this action until the writ was served, was not aware, (save as alleged in the declaration), until such inspection as aforesaid, that the notes on which the action was brought were such notes so made and issued at Calcutta.

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Willes shewed cause.—The defendant having voluntarily appeared to the action, the Court has jurisdiction. If at common law a person was served with a writ across the border in Scotland, and he thought proper to appear, proceedings might be taken on that writ. *Service* of a writ is not essential to give the Court jurisdiction. It is a common practice to send a writ to an attorney and obtain his undertaking to appear. Actual service of the writ is only a mode of giving notice to the defendant of the commencement of proceedings. Where a foreign minister was sued jointly with three other persons upon a contract entered into by them in the county from which the minister was accredited, and his attorney gave an undertaking to appear, and appeared and pleaded on his behalf; it was held, that, by voluntarily appearing, the minister was estopped from applying to the Court to strike out his name, or to stay proceedings, on the ground of his privilege: *Taylor v. Best* (a). Here the defendant could not have been compelled to appear. Outlawry on mesne process is abolished by the 24th section of the Common Law Procedure Act, 1852; and the provisions with respect to compulsory appearance are limited to particular causes of action. A Judge had no power to make an order under the 18th section, since the cause of action did not arise within the jurisdiction. The former part of that section enables a plaintiff to issue, and serve upon a defendant out of the jurisdiction, a writ in a particular

(a) 14 C. B. 487.

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form; and that has been done here. The special indorsement, which is inapplicable to such a writ, may be treated as surplusage. The latter part of the section only relates to the mode of proceeding in cases where the defendant has not appeared. Where a defendant has thought fit to appear, the fact of the cause of action having arisen within the jurisdiction is no more essential to the proceedings than it is that a writ should be personally served.

The Court then called on

Quain to support the rule.—This case is distinguishable from others, on the ground that in those the objection was apparent the moment the writ was served. In *Taylor v. Best*, the foreign minister must have known his privilege, and yet he chose to appear and plead to the action. Here the defendant could not ascertain the real cause of action unless he appeared. Prior to the enactment in question, a person residing abroad could not be legally sued in this country. It was, indeed, the practice to proceed to outlawry; but if the defendant was abroad at the time the exigent issued, he might reverse the proceedings by writ of error. [*Parke, B.*—The question is, whether, the defendant having appeared voluntarily, we can now set aside the proceedings under the writ. There is certainly no ground for setting aside the writ; it is perfectly regular.] The 18th section does not give a general authority to issue a writ, but the former part of the section is qualified by the latter; the manifest intention of the Legislature being, that the writ should only be issued in cases where the cause of action arose within the jurisdiction, or there has been a breach of contract made within the jurisdiction. Suppose such a writ was served on a foreigner abroad, in respect of a cause of action which arose abroad, and he appeared to the writ, could proceedings be taken under it? In this case the writ, at the time it was served, might or might not be regular:

acquot v. Boura (a). [Alderson, B.—It is clear, that, if the defendant had done nothing, the plaintiffs could have taken no step; then, if the defendant chooses to appear, he does so with all the consequences.] Under this writ, the plaintiffs might have declared in respect of a cause of action which arose within the jurisdiction; therefore, until declaration, it was impossible for the defendant to know whether there was any objection to the proceedings. [Alderson, B.—There was a special indorsement on the writ; and we must presume that there was any other cause of action: non apparentibus et non existentibus, eadem est ratio. Parke, B.—The difficulty might have been obviated by application to a Judge for particulars of the plaintiffs' demand.] This is not the case of a mere irregularity which may be waived, but of a nullity.

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POLLOCK, C. B.—The rule must be discharged. It is sufficient to say that the writ is regular, and the defendant has appeared to it. If the defendant had applied to a Judge for an order for particulars without appearing, no doubt the application would have been granted. It was, therefore, unnecessary for the defendant to appear; and having done so, he must abide by the consequences.

PARKE, B.—I am of the same opinion. When the matter is explained, there is no foundation for the application. The writ is perfectly regular. The statute does not require either a statement in the writ itself, or an affidavit before issuing it, that the cause of action arose within the jurisdiction of the superior Courts. Therefore, there is no irregularity in the writ itself, although the substituted mode of proceeding under it could not be applied unless the cause of action arose within the jurisdiction of the Court, or was in respect of a breach of

motion ought not to have been to set aside the appearance, on the ground that it was *videè*. I will not say that in this case such would have been successful, because the writ gives information to the defendant of action arose in Calcutta. At all events, ought not to have appeared, and, having done so, he has given the Court jurisdiction. Before declaration there may be difficulty in whether the cause of action in respect of which is suing arose abroad or in this country; but obviated by application to a Judge for particulars.

ALDERSON, B.—I am of the same opinion. The question is, is the writ regular? It is perfect. Then, next, why did the defendant appear? He was absolutely bound to do so. It is said, that because he could not tell with sufficient certainty the plaintiffs were suing in respect of a cause of action arose abroad or in this country. But if there was doubt about it, it was competent for him, with the writ, to know with certainty for what the plaintiffs were suing. If he had applied to a Judge for particulars, he would have known the cause of action as certainly before he appeared, as he could after. But instead of doing that, he appeared, and so voluntarily subjects himself to the jurisdiction of the Court.

Common Law Procedure Act, 1852. By that enactment, a writ of summons in a particular form may be served on a British subject abroad. This writ is in that form. Then where a person is served with such a writ, one of two courses is open to him; he may either appear or not. If he does not appear, no further proceedings can be taken on the writ, except upon an affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction. But if he does appear, the question becomes, whether the Court has jurisdiction in the cause. It is argued, that until declaration the defendant had no means of knowing the cause of action. But he might have obtained a summons for particulars under the 20th rule of Reg. Gen. H. T. 1853, which expressly says, that an order for particulars may be made before appearance. Instead of doing so, he appears to the action. I think, that even if a foreigner came before the Court, and stated, that, being in ignorance what course to pursue, he appeared, the Court would, except under very peculiar circumstances, deal with him as with any other person, and refuse his application to set aside the appearance. But what pretence is there for saying that the present case is one in which the Court ought to interfere. The cause of action arose in Calcutta, and the defendant, an Englishman, but who resides in France, voluntarily appears to the writ. For these reasons it seems to me that there is not the slightest ground for saying that the writ is irregular; and that, if the motion had been to set aside the appearance, it would not have been set aside.

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Rule discharged.

1855.

Jan. 26.

WILKINSON v. SHARLAND.

A declaration stated, that "the plaintiff sues the defendant for freight for the conveyance by the plaintiff for the defendant, at his request, of goods in ships." Plea, never indebted:—*Held*, that though, on demurrer, the declaration would have been bad, for not shewing a debt payable in present, according to the form given by the Common Law Procedure Act, 1852, yet the defect was cured by pleading over.

THE declaration in this case was as follows:—The plaintiff sues the defendant for freight, for the conveyance by the plaintiff for the defendant, at his request, of goods in ships; and for the demurrage of a ship of the plaintiff, kept on demurrage by the defendant; and for money paid by the plaintiff for the defendant, at his request: and the plaintiff claims 150*l*.—Plea, never indebted; upon which issue was joined.

The cause was tried before *Martin*, B., at the London Sittings after last Michaelmas Term, when a verdict was found for the plaintiff.

Knowles moved to arrest the judgment (January 16).—The declaration does not disclose any cause of action. The form prescribed by the Common Law Procedure Act, 1852, Schedule (B), is "*money payable* by the defendant to the plaintiff for freight," &c. Here the words "*money payable*" being omitted, it does not appear that any debt was *due*. In *Place v. Potts* (a), the declaration stated that "the defendants are indebted to the plaintiff for freight," &c.; and that was held bad on general demurrer. That decision may perhaps be considered as overruled by *Fagg v. Nudd* (b); but the cases are distinguishable. In the latter, the declaration was on a promissory note, for interest, and also "for money *found to be due* from the defendant to the plaintiff on accounts stated between them;" and the Court held that equivalent to an allegation that the money was *payable*. [*Alderson*, B.—There ought to be no equivalent, for the Act expressly says, "these words, *money payable*, &c., should precede money counts." *Parke*, B.—There is good reason for the form being so expressed, in-

(a) 8 Exch. 705.

(b) 3 E. & B. 650.

much as otherwise the plaintiff might be suing for a debt payable at the time of the commencement of the suit: or there may be a debt in *præsenti*, though *solvendum* in *futuro*. It is singular, that, when a form is given by Act of Parliament, stating in the fewest words all that is necessary to shew a cause of action, pleaders will not follow it. The only question is, whether the defect in the declaration is cured by pleading over, or aided by verdict.] The objection would have been fatal on general demurrer, and therefore available in arrest of judgment.

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Cur. adv. vult.

POLLOCK, C. B., now said.—This was a motion to arrest the judgment, on the ground that the declaration merely stated that “the plaintiff sued for freight,” without saying for money payable “for freight, as required by the form given by the Common Law Procedure Act, 1852. There is no doubt that the declaration would have been bad on demurrer, but, after pleading over, (I do not know that the effect of a verdict having passed is material), the declaration must be read in that sense which gives the plaintiff a right of action. The expressions used are ambiguous; and since the declaration admits of two meanings, we think that it is not competent for a party who pleads to it as a claim for a debt payable in *præsenti*, afterwards to arrest the judgment on the ground that it might also mean a debt payable in *futuro*. There will therefore be no rule. At the same time, we cannot help calling the attention of the profession to the carelessness with which the forms given by this statute are followed. Forms are provided for nearly every case which usually occurs in practice; and when the work is almost done to the hands of those who profess to draw pleadings, it is to be regretted that they will not attend to the forms provided for them; but resort to others not authorised by the Act.

Rule refused.

1855.

Jan. 17. In the Matter of a Plaintiff in the COUNTY COURT OF YORKSHIRE holden at Leeds: Between JANE HILL, Plaintiff; and ROGER SWIFT and SARAH, his Wife, Administratrix of J. MORGAN, Defendants.

The abandonment of the excess of a claim above 50*l.*, in order to give a county court jurisdiction, must be the act of the plaintiff himself, or of some person authorised by him, and not the act of the Judge.

Therefore, where a county court judge, at the hearing of a plaintiff, of his own accord and against the consent of the defendant, amended the particulars of demand by reducing the claim to 50*l.*, and gave judgment for the plaintiff for that amount, the Court granted a prohibition.

THIS was a rule calling on the judge of the County Court of Yorkshire, to shew cause why a writ of prohibition should not issue to restrain him from proceeding in the above plaint.

It appeared, from the affidavits, that the plaint was in the nature of a devastavit, and that the defendants were served with a summons, which was thus indorsed—"The plaintiff claims 50*l.* debt, and 1*l.* 1*s.* 8*d.* costs." The particulars of demand annexed to the summons were as follows:—

"To Jane Hill, of 51, Wellington-street, Leeds—Spinster.

Nov. 26, 1852. Dr. £ s. d.

To balance due from the late John Morgan, deceased, to me, for board and lodgings, &c., up to this date as per account in your possession 9 12 10

March 12, 1854.

To amount due from the late John Morgan, deceased, for board and lodgings from 26th of November, 1852, to this date, 67 weeks, at 1*s.* 6*d.* per week 38 10 6

To amount of cash received by the said John Morgan, deceased, on my account, from the 26th of November, 1852, to this date 43 13 4

To error in accounts settled on the 26th of November, 1852, as per book in Mr. Morgan's handwriting 4 0 0

To my charges for expenses and trouble in	£	s.	d.
superintending and arranging for the			
funeral of the deceased	1	0	0
	£96	16	8

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Cr.

By various sums of money paid by John Mor-			
gan, deceased, for me and on my account,			
since the 26th of November, 1852	43	15	4½
Balance due to me	£53	1	3½

"I seek to recover fifty pounds, the extent of the jurisdiction of this Court."

At the hearing of the plaint, it was objected by the defendants' counsel that the Court had no jurisdiction to decide on it, inasmuch as it appeared on the face of the particulars that the claim was for 96*l.* 16*s.* 8*d.*, which was sought to be reduced by a set off never agreed to as part payment, I still shewing a balance of 53*l.* 1*s.* 3½*d.* due to the plaintiff; and the case of *Awards v. Rhodes*(a) was cited. The Judge thereupon said, that he would amend the particulars, and, notwithstanding the objection of the defendants' counsel, he accordingly amended them as follows:—

"This action is brought to recover the sum of 50*l.* in satisfaction of the sum of 96*l.* 16*s.* 8*d.*, the amount due to me on the following account, and I abandon the excess.

Then followed the five items mentioned in the original particulars.]

Jane Hill the above-named plaintiff.

The above are the particulars amended as per order made by the Court this 30th day of October, 1854.

GEORGE BROOKS NELSON,

Clerk of the Court."

The defendants having left the Court, the Judge ordered

(a) 8 Exch. 312.

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a copy of the amended particulars to be then and there served on the defendants' attorney. The defendants' counsel still objected that the Judge had no jurisdiction, and retired from the cause. The Judge thereupon called on the plaintiff's attorney to proceed with the case as an undefended one; and he having proved a claim for 50*l.*, judgment was given for the plaintiff for that amount.

Bliss and *Kemplay* shewed cause.—First, the Judge had jurisdiction to make the amendment. It is the plaint which originates the jurisdiction, and the claim in the plaint, as shewn by the indorsement on the summons, is limited to 50*l.*—[*Parke*, B.—The claim is stated in the particulars annexed to the summons, and that exceeds 50*l.*] The fact of the particulars being wrong did not deprive the Judge of jurisdiction, since there was a good plaint and summons. The Judge had power to amend the particulars under the 104th rule (*a*), which provides, that, “where at the hearing a variance appears between the evidence and the matters stated in any of the proceedings in the county court, such proceedings may, at the discretion of the Judge, and on such terms as he shall think fit, be amended, and such amend-

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the superior Courts, particulars of demand may be amended: *ones v. Corry* (a).—[*Martin*, B.—There would be a summons for leave to amend, and after the order was made new particulars would be delivered; that has not been done here.] In *Walsh v. Ionides* (b), the Court of Queen's Bench held, that the county court judge might in his discretion allow the particulars to be amended, in respect of the statement of the breach of contract. But further, the judge might have proceeded on these particulars, as they originally stood. It was competent for the plaintiff to consent to a reduction of his claim by allowing payments made on his account, and such consent need not appear on the summons or particulars: *Kimpton v. Willey* (c), *Joseph v. Henry* (d), *Isaac v. Wyld* (e). The particulars contain several items, each below 50*l.*, and the plaintiff has not split his cause of action, as was objected in *Grimbly v. Lytroyd* (f).—[*Parke*, B.—The plaintiff nevertheless cannot include all his claims in one summons, where together they exceed 50*l.*] Such objection, however, is no ground for a prohibition: *Guardians, &c., of Leaden v. Southgate* (g).—[*Martin*, B.—The objection there proceeded on the ground that there was a misjoinder, the defendant having been sued in two separate characters in the same suit. *Parke*, B.—And the whole claim was for less than 50*l.* This point is not tenable.] The Court had jurisdiction if the payments allowed in reduction of the claim are to be taken as payments made on account of the claim. [Parke, B. It ought to appear that the judge had power to treat the set-off as a payment of the claim. But the judge cannot do that, except by the permission of the plaintiff himself. I think the attorney has no power to agree to the reduction being made for the purpose of giving the county court jurisdiction, without consulting his client.]

(a) 6 Bing. N. C. 247.

(b) 1 E. & B. 383.

(c) 19 L. J., C. B., 269.

(d) 19 L. J., Q. B., 369.

(e) 7 Exch. 163.

(f) 1 Exch. 479.

(g) Ante, p. 201.

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Awards v. Rhodes (a) was an appeal from the decision of a judge, and was not a proceeding for a prohibition. That decision cannot be taken as an authority that the judge has no power to make such an amendment.

Edwin James and *Prentice* appeared in support of the rule, but were not called upon to argue.

POLLOCK, C. B.—I am fully satisfied that the plaintiff's attorney had no authority to agree to the abandonment of the excess, I therefore think that the rule ought to be absolute.

PARKE, B.—The question arises upon the 63rd section of the 9 & 10 Vict. c. 95, by which jurisdiction was given to the county courts in certain cases not exceeding 20*l*. That jurisdiction was extended to 50*l*., by the 13 & 14 Vict. c. 61, s. 1. The amendment clause applies only to cases where there is a variance between the proceedings and the evidence; but there is none here. I agree, that, according to *Isaac v. Wyld* (b) it is competent to the plaintiff to abandon the excess of his claim, in order to give the county court jurisdiction; and that notice of the abandonment must be given to the defendant on or before the hearing of the cause. But the abandonment must be made either by the plaintiff himself, or by some person authorized by him to make it. The Judge has no power to make it as an act of his own. We ought therefore to be satisfied that the abandonment in this case was made by the plaintiff's authority. I am not satisfied that the plaintiff did consent, and indeed I think that the attorney himself was not aware of the effect of the proceeding. As to *Awards v. Rhodes*, I may observe, that the Court there expressly recognises the right of a plaintiff to reduce his demand in the way pointed out in *Isaac v. Wyld*, which is good law.

(a) 8 Exch. 312.

(b) 7 Exch. 163.

ALDERSON, B.—I cannot help thinking that the judge of the county court, when called upon to give jurisdiction, ought not to do what is required for that purpose without making the applicant pay the costs incurred up to that time by the opposite party, who may have appeared to contend that the court has no jurisdiction.

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MARTIN, B., concurred.

Rule absolute.

In re THE CHELSEA WATERWORKS COMPANY.

Jan. 18.

Ex parte PHILLIPS.

THE Chelsea Waterworks Company, requiring for the purpose of their works certain land near Kingston, in Surrey, belonging to one John Phillips, and the parties not being able to agree as to the amount of compensation to be paid for the land, proceeded to have it determined by the verdict of a special jury, under the provisions of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, ss. 23, 53, 54. A special jury was accordingly summoned, but a sufficient number did not attend at the time and place appointed; whereupon the under-sheriff went into the town of Kingston, and brought back with him certain persons supposed to be qualified to act as jurymen under the 6 Geo. 4, c. 50; and they were then sworn, and acted on the inquiry. Two of them, however, were not on the jury list, and one was not qualified by assessment to rates.

The Court will not set aside the verdict on an inquisition to determine the compensation for land taken under the 8 & 9 Vict. c. 18, on the ground that some of the jurymen were not qualified to act as jurors; the remedy, in such case, being by challenge.

Shee, Serjt., now moved for a rule to shew cause why a writ of prohibition should not issue to restrain the sheriff of Surrey from causing to be recorded, the clerk of the peace from recording, and the Waterworks Company from acting on, the assessment and verdict of the jury.—The

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question depends on the Jury Act, 6 Geo. 4, c. 50, and the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18. The 41st section of the latter Act provides for the summoning of a common jury, who must be "indifferent persons qualified to act as common jurymen in the Courts." By the 54th section, the sheriff, at the request of either party, "shall proceed to nominate and summon a special jury, in the manner in which such juries are required by the laws for the time being in force to be nominated or struck by the proper officers of the Courts." By sect. 55, the special jury shall consist of twelve, the parties having their lawful challenges; and if a full jury do not appear, or if after such challenges a full jury do not remain, then upon the application of either party the sheriff shall add to the list of such persons the names of any other disinterested persons *qualified as special or common jurymen*, who shall not have been previously struck off the aforesaid list, and who shall be attending the Court, or can speedily be procured to complete such jury; all parties having their lawful challenges against such persons." The words "persons qualified to act," must mean persons whose names are

per persons, for he ought to have challenged them.] In *Norman v. Beaumont* (a), a verdict was set aside because one of the jurymen was not returned on the Nisi Prius panel, but answered to the name of a person who was.

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POLLOCK, C. B.—If we were to grant a rule, it would only lead to a waste of time in discussing a matter about which no doubt can exist.

PARKE, B.—I am satisfied that in this case the only remedy is that provided by the statute, viz. the right of challenge. That has not been exercised, and therefore the objection is only matter of form, not substance.

ALDERSON, B.—I am of the same opinion. The party has a right to have the matter fairly tried; it has been fairly tried, and now he seeks to set aside the verdict on account of a mere slip.

MARTIN, B., concurred.

Rule refused.

(a) Willes, 484.

1855.

Jan. 22.

LOMAX v. ARDING.

A declaration stated, that the plaintiff agreed with the defendant to serve him for three years, as manager of certain iron-works, at the salary of 4*l.* per week, upon the terms, that the plaintiff would, "during that time, use his best endeavours to promote the interest of the defendant, and attend to and carry out all reasonable requests made to him by the defendant." The declaration, after stating that the

THE declaration stated, that, on the 7th of June, 1853, it was agreed by and between the plaintiff and the defendant, in manner following, that is to say, it was agreed between them, that the plaintiff should serve the defendant for three years from the 1st of July, 1853, as manager of certain iron-works of the defendant's, at and for the salary of 4*l.* per week during the said term; and the plaintiff agreed with the defendant that he the plaintiff would during that time use his best endeavours to promote the interest of the defendant, and would attend to and carry out all reasonable requests made to him by the defendant, the plaintiff acting for the defendant as he the plaintiff had theretofore done for one John Smith, his then employer; and the defendant agreed with the plaintiff that he would pay to the plaintiff the said sum of 4*l.* per week for the said term of three years, for his services as aforesaid in the capacity aforesaid; and the plaintiff says, that he afterwards entered into the service of the defendant, and served the defendant in the capacity

ndant wrongfully, and without any reasonable or probable
 : whatsoever, to wit, on the day and year last aforesaid,
 issed the plaintiff from such service, and has thence
 erto wholly refused to continue the plaintiff in his said
 ce, and has from thence hitherto refused to pay, and
 ot paid him, the said sum or salary of 4*l.* per week, al-
 gh the said term of three years is not yet expired ; and
 plaintiff has been and is by means of the premises
 ly unemployed.

æ.—“ That the plaintiff did not, whilst he was in the
 dant’s employ under the said agreement, use his best
 vours to promote the interest of the defendant ac-
 ng to the said agreement; therefore the defendant did
 is the plaintiff, and refused to pay him any salary
 such dismissal, and which dismissal is the said dismissal
 : declaration mentioned.”

murrer and joinder.

affits in support of the demurrer.—The plea does not
 iently justify the dismissal of the plaintiff from the
 dant’s service. Although the declaration states that
 as specifically agreed between the parties that the
 tiff would, during the period of his engagement, use
 est endeavours to promote the defendant’s interest,
 uch a stipulation is by law implied in all contracts of
 ilar description. A master is not entitled to dismiss a
 nt for every trifling act of disobedience ; but, in order
 tify such a course, the servant must have been guilty
 lful disobedience of his master’s orders, or of gross
 l misconduct. [*Parke, B.*—The defendant, no doubt,
 d be justified in dismissing the plaintiff for such mis-
 ct, but there may be other matters also for which he
 d have the same remedy. Here the agreement con-
 an express stipulation that the plaintiff will act in a
 in way, and the defendant alleges that the plaintiff
 not so acted, and for that reason he dismissed him.

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Martin, B.—The plea is not a mere traverse, but is by way of confession and avoidance. *Pollock*, C. B.—Suppose the plaintiff had conducted himself on all occasions in a negligent and lazy spirit, there may be insuperable difficulty in a legal definition of the plaintiff's conduct, and yet the defendant would be justified in discharging him from his service. It would be a question of evidence.] The plea ought to shew upon the face of it enough to satisfy the Court that the defendant is justified. If the plaintiff has acted in the manner suggested by the Court, that should have been alleged. [*Parke*, B.—If that objection to the plea had been raised by special demurrer, before the Common Law Procedure Act, 1852, the objection would have been allowed. If the plaintiff felt himself embarrassed by the plea, he might perhaps have obtained relief on application to a Judge at Chambers. This is not the case of a *menial* servant. The question, in what case and upon what grounds an employer has the right to discharge a person employed by him, has only been considered in modern times, and is not fully settled. *Callo v. Brouncker* (a), *Ridgway v. Hungerford Market Company* (b), and *Mercer v. Whall* (c), contain instances of the misconduct of the party employed; but there may be many other matters which would justify a dismissal by the master. *Martin*, B.—The plaintiff had better take issue on the plea and leave the question for the decision of a Judge and jury, and if he is dissatisfied with the ruling, he may tender a bill of exceptions.]

Wise, contra, was not called on to argue.

PER CURIAM (d).—The plaintiff may withdraw the demurrer and traverse the plea, on payment of costs, otherwise there will be

Judgment for the defendant.

(a) 4 Car. & P. 518.
(b) 3 A. & E. 171.
(c) 5 Q. B. 447.

(d) *Pollock*, B., *Parke*, B., and
Martin, B.

1855.

MARTIN v. HEWSON.

Jan. 24.

declaration was for money had and received by the plaintiff to the use of the plaintiff.

That "the money in the declaration alleged to have been received by the defendant to the use of the plaintiff was money deposited by the plaintiff in the hands of the defendant as stakeholder, to abide the events of certain cock fights, between cocks produced for the purpose of such fights by the plaintiff and one J. H., on the events the same had been wagered by the plaintiff and said J. H."

The plaintiff demurred to this plea, and there was a demurrer. The plaintiff also replied, that "before the result of the said wager was ascertained, and before the said cock fights had come off, and whilst the defendant held the deposit, the plaintiff repudiated the said deposit and cock fights and put an end to the same, and the events came off or were determined, and the result of the wager and cock fights never was determined; and the plaintiff then, and before this suit, required the defendant to return to the plaintiff his said deposit, being the money now sought to be recovered."

The defendant demurred thereto and joinder.

Held for the plaintiff.—The plaintiff is entitled to judgment on these demurrers. First, with respect to the first demurrer. Assuming a cock fight to be an illegal game; however, the plaintiff is fully prepared to contend in his replication shews that the plaintiff demanded the money before the event came off; and according to the authority of *Varney v. Hickman* (a), the 8 & 9 Vict. 18, which avoids contracts by way of gaming and

To an action for money had and received, the defendant pleaded, that the money had been deposited by the plaintiff in the hands of the defendant as stakeholder, to abide the event of a certain illegal game, on which event the money had been wagered by the plaintiff. Replication, that, before the result of the wager was ascertained, the plaintiff repudiated the wager, and required the defendant to repay the money to him:—*Held*, on demurrer, that the replication was good, and that the plea was bad for not alleging that the wager had been determined.

(a) 5 C. B. 271.

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MARTIN
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wagering, and prohibits the maintenance of actions for the recovery of money won upon any wager, or deposited in the hands of a stakeholder to abide the event of any wager, does not preclude a party, who repudiates the wager before the event is ascertained, from recovering back from the stakeholder the amount of his deposit. [*Parke, B.*—If the defendant were correct, there would be no locus penitentie open to the parties laying a wager.] The replication is therefore good. The plea is bad for not negating the facts alleged in the replication. A plea, to be good, must be good in omnibus.

Gray contra.—The plea is good, as it brings the case within the precise words of the statute. Now the 18th sect. of the 8 & 9 Vict. c. 109, enacts, that "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: provided

of a replication. The defendant was not bound to allege that the contract was not repudiated—*prima facie* the plea is a good answer to the plaintiff's claim.

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HEWSON.

Milward was heard in reply as to the sufficiency of the plea.

PER CURIAM (a).—The plea is bad, and the replication is good; the plaintiff is therefore entitled to judgment on both demurrers.

Judgment for the plaintiff.

(a) *Pollock, C. B., Parke, B., and Alderson, B.*

HEALD and Others v. KENWORTHY.

Jan. 17.

THE declaration was for goods sold and delivered.

Plea—That the selling and delivering in the declaration mentioned was, and consisted in, the sales and deliveries hereinafter in this plea mentioned, and not otherwise; and that the sales and deliveries of the said goods to the defendant, and the purchases by the defendant from the plaintiffs, were made by the agency, on behalf of the defendant, of W. V. Taylor, and not otherwise; and the said purchases, and the acceptance from the plaintiffs of the said goods, were made by, and the said sales and deliveries the plaintiffs were made to, the said Taylor in his own name and not in the name of the defendant; and that the plaintiffs at the time of, and in and about the said sales and deliveries, gave credit to the said Taylor as buyer of the said goods, and in respect of the prices thereof, and in all respects treated him as a principal, and continued so to credit him

Where a principal authorises his agent to pledge his credit, and the latter makes a purchase on his behalf, and thereby creates a debt, the principal is not discharged by payment to the agent, if the money is not paid over to the seller, unless the latter, by his conduct, makes it unjust that the principal should be sued; as for example, where the

or by his words or conduct induces the principal to believe that a settlement has been made between the seller and the agent, in consequence of which the principal pays the amount of the debt to the agent.

On an action for goods sold, the defendant pleaded that the purchase was made by one of the defendant's agents, and that the defendant, within a reasonable time after the sale, not unduly early, bona fide paid T. sufficient money to pay the plaintiffs:—*Held*, on demurrer, that the plea was bad.

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and to treat him until after the defendant had made the payments to the said Taylor, and settled with and satisfied him as hereinafter is mentioned; and the plaintiffs did not at any time, until after the defendant had so made the payments to and settled with and satisfied the said Taylor as aforesaid, give credit to the defendant in respect of any of the said sales or prices, or in any way treat the defendant as buyer of the said goods or any part thereof, or as in any way responsible to the plaintiffs, or make any claim or demand on him in respect of any of the said sales or prices; and that after the said sales respectively, and before the defendant knew or had notice or reason to believe that the said Taylor was or would be unable to pay, or that he would not pay the vendors of the said goods the prices thereof in full, according to the terms of the said sales, and when (on the contrary) the defendant had reason to believe, and did believe, that the said Taylor would duly settle with the vendors according to the said terms, he the defendant bonâ fide settled with the said Taylor in respect of the said purchases and prices, and bonâ fide paid the said Taylor, on account of the said goods and the purchases and prices thereof, monies sufficient, and more than sufficient to pay and satisfy the said prices and all claims of the said Taylor in respect of the said purchases and prices, and being sufficient and more than sufficient to pay and satisfy all claims of the plaintiffs in respect of the said goods and the said prices; and the said Taylor then became, and was, satisfied in respect of the said goods and prices, and of all claims on account thereof, and then became indebted to the defendant, and hath at all times continued and still is so indebted to the defendant; and the defendant hath not since the said settlement been indebted to the said Taylor; that the said payments to the said Taylor were made by the defendant before commencement of this suit, and were made by the defendant at reasonable and proper times, and according to the usual course of dealing

the defendant and the said Taylor, and according to the usual and proper course of business, and not unduly and the said times were times which, before and the defendant made the said payments, were represented by the said Taylor to the defendant to be, and the defendant before and when he made the said payments had reason to believe and did believe to be, the usual and proper times of payments of the said sums, necessary and proper, in order to put the said Taylor to rights, and enable him to pay and satisfy the vendors according to the terms of the said sales; and that before the defendant had notice that the plaintiffs had been the vendors, or that the vendors were not paid according to the terms of the said sales, the defendant had reason to believe, and did believe, that the persons who had sold the goods to the said Taylor as aforesaid had been paid; and the defendant did not know, nor had notice until after he made the payments to and settled with and satisfied the said Taylor as aforesaid, nor until after the defendant received the said goods from the said Taylor, that the plaintiffs had become or were vendors of the said goods, or of them, or that they made or had any claim in respect of any of the said goods, or of the prices thereof, the defendant knew, nor had he notice until after he made the payments to and the settlement with and satisfied the said Taylor, what were the terms as to times or mode of payment on which the said Taylor had bought the said goods, or any of them; and the defendant says that according to the terms of the said sales by the plaintiffs the said prices were payable to the plaintiffs before the defendant first had notice of any claim of the plaintiffs in respect of any of the said goods.

error and joinder.

Case came on for argument in last Michaelmas Term (month 13), when the Court, inclining to the opinion

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that the plea was ambiguous, and might perhaps afford a defence, as amounting to the general issue, and the parties being desirous that it should raise the substantial question, the case was ordered to stand over for the purpose of amending the plea. Certain alterations were now made in the plea by the Court, to admit that a debt had been created between the plaintiffs and the defendant.

Clausby in support of the demurrer.—It being agreed that the plea shall not be taken to amount to the general issue, it affords no defence to this claim by the seller of the goods against the principal. The simple fact, that a principal has bona fide provided his agent with money for the payment of a debt, which money is not paid by the agent to the creditor, does not discharge the principal. [*Alderson*, B.—Credit was not given to the agent by the plaintiffs. *Parker*, B.—The plaintiffs' argument is, that the simple fact of the agent having received the money is no answer to the claim. The defendant was bound to see that the plaintiffs were duly paid. This case does not fall within the principle that the debtor cannot be sued where he has been misled by the creditor to make the payment.

between the defendant and his agent, the case would have fallen within the same principle.—He was then stopped by the Court.

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Aspland contra.—The plea alleges that the goods were delivered to the agent, and that when the payment was made by the defendant to him he had reason to believe, and did believe, that the agent would pay the plaintiffs, and that payment so made to the agent was not unduly early. It has been assumed on the part of the plaintiffs, that the rule under which the principal when discovered is liable to the seller is an unlimited one. But the application of that rule depends on the particular facts of the case; for instance, a foreign principal is not liable. [*Parke, B.*—The question of his liability is one of fact. Where the seller deals with an agent resident in this country, and acting for a foreign principal, the presumption is, that the seller does not contract with the foreigner and trust him, but with the party with whom he makes the bargain. That is a question of fact, and not of law. *Martin, B.*—Here the defendant authorised his agent to pledge his credit. The case differs from that where a servant is sent with the money in his hand to make a purchase, for there the master gives no authority to his servant to pledge his credit. *Parke, B.*—A debt has been created by the defendant's authority. He is bound to see that it is paid. What, then, is there in the plea which precludes the plaintiffs from recovering their debt?—There is no authority precisely in point, although the reports contain several *dicta* which are in the defendant's favour. In *Paterson v. Gandasequi* (a), Lord *Ellenborough, C. J.*, said, "The case in which I remember that the liability of a principal was carried furthest was *Powel v. Nelson*, upon the Western Circuit, of which Mr. Justice *Lawrence* had a manuscript

(a) 15 East, 62.

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note. There, a factor made purchases for his principal, who made payments for him on account. Afterwards the factor was pressed for payment by a letter which came to the hands of the principal, who transmitted it to the factor, and with a knowledge of the fact paid him the residue. It was held by Lord *Mansfield*, C. J., that the principal was liable over to the sellers for the money he had so paid to his factor after notice." In *Smyth v. Anderson* (a), *Maule*, J., in delivering the judgment of the Court, cites the dictum of *Bayley*, J., to be found in *Thomson v. Davenport* (b), that "it is said that the seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so, he might have lost his right to claim payment from the principal, had the latter paid the agent, or had the state of the accounts between the principal and the agent been such as to make it unjust that the former should be called upon to make the payment." [*Parke*, B. —Something however must occur to make it *unjust* to call upon the principal for payment; where, for instance, the seller tells the principal that he will look to the agent for payment, and the principal pays the agent, it would be *unjust* to hold the principal liable, in case of non-payment by

purchase goods for him, with authority to pledge his credit. The agent does so, and thus creates a debt; and I agree with the remark made by my Brother *Parke*, that all the cases in which the principal has been held to be discharged, are cases in which the seller has enabled the agent to misrepresent, or where the agent by some conduct adopted by the seller has placed his principal in a worse situation than that he ought to be in. This plea contains nothing of that sort. It merely states that the plaintiffs treated Taylor as the principal, and that the defendant *bonâ fide* settled with him.

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PARKE, B.—I am of the same opinion. The plea simply states, that, after the contract was entered into between the plaintiffs and a third party, the agent of the defendant, under circumstances which rendered the defendant liable upon it, the latter paid the agent. I am of opinion that this is no defence to the action. It is clear, that, if a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt; and the giving the agent money for that purpose does not amount to payment, unless the agent pays it accordingly. But there are no doubt cases and dicta, which, unless they be understood with some qualification, afford ground for the position taken by the counsel for the defendant. First, there is the dictum of *Bayley, J.*, in *Thomson v. Davenport*, where that learned Judge says down the rule, that “if the agent does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable.” And he then proceeds to say, if the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer

buyer for the money ; as for example, where a person is induced by the conduct of the seller to pay money on the faith that the agent and seller have made a settlement on the matter, or if any representation is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and say that the principal is not bound. It would be *unjust* for him to think that there is no case of this kind where he has been precluded from recovering, unless he has in some way contributed either to deceive the defendant or to induce him to alter his position. This was the decision in *Wyatt v. The Marquis of Hertford*. Here the seller took the security of the agent and the principal and gave the agent a receipt as if the money was due from the principal, in consequence of which the principal dealt differently with his agent on the receipt, and it was properly held that the seller was bound to the principal. So in the case put by Lord Ellenborough J., in *Kymer v. Suwercropp*, the observations of the Judge are perfectly correct ; for the fact of allowing the time for payment to elapse might be evidence of deceit on his part, and of his having told the principal to pay the agent. Neither does *Smyth v. Anderson*, nor the elaborate judgment of Lord Brother Maule, contain anything at variance with the principle I have stated. He adopts the pr

chase, although he did not inform the seller who his principal was, the invoice stated that the goods "were bought on account of B." the principal. The seller drew certain bills of exchange on the agent, who became insolvent before the bills arrived at maturity. The principal, after having received advice of the purchaser, and of the acceptance of the bills by the agent, made large remittances on account of the goods to the agent, who at the time of his stoppage was largely indebted to his principal. My Brother *Maule* says, the Court were of opinion that under such circumstances it was unfair and unjust to allow the seller to receive the value of the goods from the principal. I think that there is no authority for saying that a payment made to the agent, as in this case, precludes the seller from recovering from the principal, unless it appears that he has induced the principal to believe that a settlement has been made with the agent. There is no averment of that kind here, and consequently the plaintiffs are entitled to recover.

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ALDERSON, B.—I am of the same opinion. It is clear that the defendant, who is the principal in the transaction, authorised the agent to contract the debt on his account; the defendant afterwards paid his agent money, which, however, he did not pay over to the plaintiffs. Now the defendant is not excused from seeing that the plaintiffs are paid, unless the latter by their acts induced the defendant to make the payment to their agent. Where the seller trusts the agent only, and says that he will consider him as the only party liable, the agent alone is responsible, and the seller cannot proceed against the principal. But there must be some act on the part of the creditor to warrant us in saying that the payment by the debtor to his agent is to be treated as a payment to the creditor. Where a creditor by his conduct induces the debtor to pay a third party, and thereby alters his debtor's position, it would be

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unjust to call upon the debtor to pay the amount of the debt to the creditor. But there is nothing of that sort in this case, and consequently the defendant is not discharged.

Judgment for the plaintiffs (a).

(a) *Martin*, B., had left the Court during the argument.

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JAMIESON *v.* TREVELYAN and ELIZABETH his Wife.

The 17 Car. 2, c. 7, applies to a rent charge as well as to a rent service.

The term "full costs" in that statute means ordinary costs as between party and party, and not costs as between attor-

COLE had obtained a rule, calling on the defendants to shew cause why the Master should not review his taxation. It was an action of replevin, in which the defendants had avowed for a rent charge under a will (a). The record was made up, and the cause taken down for trial by each of the parties to the action, and the defendants obtained the verdict; when the defendants' damages were assessed under the 21 Hen. 8, c. 19, s. 3. The Master on the taxation had

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Watson and Willes shewed cause.—First, the 17 Car. 2, c. 7, is not confined to proceedings on a distress for *rent service*, but also applies to such proceedings for arrears of a *rent charge*. That statute, which is intituled “An Act for a more speedy and effectual proceeding upon distresses and avowries for rents,” recites, that “forasmuch as the ordinary remedy for arrearages of rents is by distress upon the lands chargeable therewith; and yet, nevertheless, by reason of the intricate and dilatory proceedings upon replevins, that remedy has become ineffectual;” and after directing the mode in which such proceedings shall be had, enacts, that, “in case such plaintiff shall be nonsuit after cognizance or avowry made, and issue joined, or if the verdict shall be given against such plaintiff, then the jurors, that are empannelled or returned to inquire of such value, shall, at the prayer of the defendant, inquire concerning the sum of the arrears, and the value of the goods or cattle distrained; and thereupon the avowant, or he that makes cognizance, shall have judgment for such arrearages, or so much thereof as the goods or cattle distrained amount unto, together with his *full costs*, and shall have execution for the same by fieri facias or elegit, or otherwise, as the law shall require.” The 3rd section, which provides for the case of judgment on demurrer, speaks of “the avowant, or him that maketh cognizance for *any rent*,” which, when taken in connection with the term *rent* as used in other parts of the Act, clearly shews that the word “rent” includes a rent charge. The 11 Geo. 2, c. 19, applies only to the case of landlord and tenant; but the 17 Car. 2, c. 7, has no such qualification. An early allusion to this statute is to be found in *Mounson v. Redshaw*(a), which was decided in 19 Car. 2. In Com. Dig. “Pleader,” 3 K. 30, pl. 9, it is laid down, that, “if the avowry is for rent charge as well as for rent service, the jury shall inquire what rent was in arrear, and the value of the cattle distrained.” This Act

(a) 1 Wms. Saund. 187.

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is remedial, and there is nothing to confine it to cases between landlord and tenant.—See *Short v. Hubbard* (a).

Secondly, the term "full costs" in the 17 Car. 2, c. 7, s. 2, entitles the defendants to the costs as between attorney and client. The statute was intended to provide a complete indemnity for the successful party in replevin. It was passed to remedy the hardship which existed at the time it came into operation, and which had not been removed by the 23 Hen. 8, c. 15, or the 4 Jac. 1, c. 3. The last-mentioned statute gave defendants their costs; but a practice was introduced of cutting down the costs, and thereby depriving parties of expenses which they had reasonably incurred, and as to which they were improperly precluded from being reimbursed. The expressions "costs," "full costs," and "double costs," are now to be found in various statutes. The 126th sect. of the 8 & 9 Vict. c. 18, contains the words "full costs and expenses," which in *Doe d. Hyde v. The Mayor &c. of Manchester* (b), the Master on taxation held to mean liberal costs as between party and party, and not costs as between attorney and client. [*Martin, B.*—The rule there was made absolute without opposition, and consequently the point cannot be

which he has referred.] The words "full costs," as used by the Legislature at the time of Car. 2, have a more extensive meaning than could be attributed to the simple expression "costs." [*Martin*, B.—I think it is a strong argument for there being no distinction between "full costs" and "costs," as nothing is to be found in support of such a distinction in Mr. Gray's work on Costs. *Parke*, B.—In *Irwine v. Addish* (a)—where the question arose on the 11 Geo. 2, c. 19, 19, the Court said, "In this case the statute gives full costs; but that cannot make any difference, for no distinction is known in the law between costs and full costs, and at the point of practice there is no difference in the mode of taxation."]

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Thirdly, the defendants were entitled to the costs of making the record, and of entering it for trial. A plaintiff in replevin may neglect to proceed, and in many cases it is his interest not to take any step. He may withdraw the record, and defeat the defendant. In Com. Dig. "Pleader," 3 K. 1, pl. 19, it is laid down, that, "since the defendant in replevin (quære if before avowry) is an actor as well as the plaintiff, he, like the plaintiff, may take down the record to trial without a proviso; the plaintiff, therefore, can never be guilty of laches in not going to trial, so that there can be no judgment as in case of a nonsuit."

Fourthly, the defendants were entitled to the costs of the distress. The costs so incurred may fairly be treated as incidental to the suit. [*Martin*, B.—Those costs are altogether anterior to the suit.]

Cole, in support of the rule, was directed by the Court to confine his argument to the last two points.—As to the third point, it is a hardship on the plaintiff to be required to pay the costs of a proceeding to which he is not a party, and which was not caused by his default. [*Parke*, B.

(a) 5 B. & Ald. 796.

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—Where a record is taken down by proviso, although the plaintiff also takes down the record, the defendant is entitled to the costs of his record. It is, therefore, but reasonable that the same rule should be applicable to this case. *Alderson, B.*—There is no other way open to the defendant by which he can be certain that his cause will be tried.] As to the last point, the defendant gets the costs of the distress by way of *damage*. These expenses are not costs in the suit.

POLLOCK, C. B.—The rule must be absolute for the Master to review the taxation upon the second and last points only. We think the term “full costs,” means ordinary costs as between party and party; this is in accordance with the practice. The costs of the distress ought not to have been allowed. Upon the other point the taxation was correct. The rule will be absolute accordingly.

PARKE, B.—I agree that the term “full costs” merely means the ordinary costs as between party and party. The expression seems to have been introduced into the 17 Car. 2, c. 7, merely for the purpose of excluding the idea that the defendant was only to be entitled to recover a limited sum for costs, according to the provisions of certain statutes which were in operation at that time. As to the costs of the record, I think it is but reasonable, although the plaintiff has taken down a record, that the defendants should be allowed the expense of their record. Then, as to costs incurred by making the distress. Under the 11 Geo. 2, c. 19, s. 22, (The Landlord and Tenant Act), successful defendants in replevin were entitled to double costs of suit. So much of that statute as gave a defendant double or treble costs is repealed by the 5 & 6 Vict. c. 97, which gives in lieu thereof a “full and reasonable indemnity as to all costs, charges, and expenses incurred in and about the action, suit, or other legal proceeding, to be taxed by the proper officer.”

however, is under the 19 Car. 2, c. 7, which gives no indemnity for all charges. It may be that this is the case. The costs of making a distress are not in the suit either in the superior or inferior Court. They do not appear to be provided for, and consequently are not allowable.

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B., concurred (a).

Rule absolute accordingly.

on, B., had left the Court shortly before the conclusion of the case.

1. THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF DOVER. Jan. 17.

The declaration stated, that, by a deed made between the plaintiff and the defendants, the defendants acting as a local board of health for the borough of Dover, the plaintiff contracted to construct certain brick sewers, and glazed stone-ware and cast-iron pipe sewers and water pipes, and to build two engine and boiler-houses, coal-stores and covered reservoir and a cottage, and to construct certain other works.

The plaintiff, an engineer, contracted with the defendants, a Corporation, by deed to execute certain works. The deed contained a clause, by which it was covenanted that the defendants' engi-

neers should have power to direct the way in which various portions of the work should be done, and that if it should appear to him that they were not properly executed, and with due regard to the safety of the works, it should be lawful for him to give notice in writing to the plaintiff to alter the manner of the work, and to supply proper and sufficient materials and labour, and with due regard to the safety of the works, to proceed therewith; and if the plaintiff should for the space of seven days after the giving of this notice fail to comply therewith, then it should be lawful for the engineer to take the work out of the plaintiff's hands. It appearing to the defendants that the works were not being properly executed and with due expedition, the following written notice to the plaintiff:—"I give notice to you to supply sufficient materials and labour for the due prosecution of the works, and to proceed therewith; and further, that if you shall for the space of seven days after the giving of this notice fail or neglect to comply therewith, I shall as agent on behalf of the said A. B. (the defendants), take the works wholly out of your hands."—*Held*, that the notice was sufficiently specific.

ready and willing to complete the whole of t
a breach, that the defendants would not suffi
to proceed to complete the works, and that t
discharged him from any further perform
pletion of them.

Plea—That the plaintiff and the defenda
by the deed, that the defendants' engine
power to direct the order in which the var
the works should be done ; and if at any
appear to him that the works, or any part th
being properly executed and with due exped
be lawful for him to give notice in writing t
his executors or administrators, or his or
agents, to alter any improper work, and to su
and sufficient materials and labour for the d
of the works, and with due expedition to pro
and if the plaintiff, his executors or adminis
for the space of seven days after such notice l
fail or neglect to comply therewith in all
matters enjoined therein, then and in ever
should be lawful for the said engineer, or
defendants and their successors, to take t
either wholly or in part out of the hands o
his executors or administrators, and engage
such persons, and procure all such proper
implements for the purpose of completing th

of the plaintiff, his executors or administrators; or at their option the defendants might enter into any new contract or contracts with any other person or persons for the completion of the works; and the plaintiff, his executors or administrators, should, in any or either of the cases aforesaid, pay unto the defendants, or their successors, all sums of money, costs, charges, and expenses, which might be paid or incurred by the defendants in procuring the completion of such works over and above the contract prices.—The plea then alleged, that, at the time of the making of the deed, and at the several other times, &c., one T. W. R. was the engineer of the defendants; and that, after the plaintiff had done the said works in part, and before the day next hereinafter mentioned, it appeared to the said engineer that the works were not being properly executed and with due expedition, and thereupon, to wit, on the 7th of February, 1854, the said engineer in pursuance of the said covenant gave notice in writing to the plaintiff to supply all proper and sufficient materials and labour for the due prosecution of the works, and with due expedition to proceed therewith; that the plaintiff did, for the space of more than seven days after the said notice was given to him as aforesaid, fail and neglect to comply therewith in all and every of the matters enjoined therein; and that thereupon, to wit, on the 20th of February, 1854, the said engineer of the defendants, by virtue and in pursuance of the said covenant, did on behalf of the defendants take the works wholly out of the hands of the plaintiff; which is the alleged breach of covenant mentioned.

The plaintiff by his replication took issue on the plea, except as to the notice; and as to that he pleaded, that he admitted a notice in writing had been given to him as alleged in the plea, which notice was as follows:—

“To Mr. R. C. Pauling.—Whereas it appears to me, that the works contracted to be done by you the said R. C. Pauling, for the mayor, aldermen, and burgesses of the

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borough of Dover, by a certain deed, dated the 6th day of September, 1853, and made between you the said R. C. Pauling of the one part, and the said mayor, aldermen, and burgesses of the other part, are not being properly executed and with due expedition: Now, therefore, I hereby give notice to you the said R. C. Pauling to supply all proper and sufficient materials and labour for the due prosecution of the said works, and with due expedition to proceed therewith; and I further give notice, that if you the said R. C. Pauling shall for the space of seven days after the giving of this notice fail or neglect to comply therewith, I shall, as the engineer and on behalf of the said mayor, aldermen, and burgesses, take the said works wholly out of your hands. Dated this 7th day of February, 1854. T. W. R., engineer."

Demurrer and joinder.

Willes, in support of the demurrer.—The question turns on the sufficiency of the notice set out in the replication. The plaintiff will contend that it is not sufficiently specific; and it will be said that it ought to point out in what respect

Parke, B.—It is a general objection to the whole work, that it is not properly done, and that it is not proceeding with due expedition.]

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Wilward contra.—The notice is not sufficiently specific. The defendants were not entitled to take the works out of plaintiff's hands, unless it should appear to the engineer, that he had power to direct in what way different portions of the works were to be done, that the works were not properly executed, and with due expedition; and that a notice to that effect had been given to the plaintiff, and that he had elected to obey the notice. One object in providing for the giving of a notice was to inform the plaintiff in what respect his work was deficient, and in what way the engineer found it to be so. [*Parke, B.*—The engineer's objection may be, that the work is carried on in a sluggish manner; he therefore gives the contractor notice to go on faster. He is not bound to say how many more men ought to be employed, or what other materials the contractor must use. The propriety of the notice itself is not a question for the jury, but it is for them to say whether the contractor has obeyed the notice by proceeding with the work with all due expedition.]

Erson, B.—How could a notice be drawn to state so specifically that the contractor must proceed faster with the work on hand?]

Collock, C. B.—We are all of opinion that the notice is sufficient. It would be a difficult matter to frame a notice so specifically, unless the party giving it were bound to go down into minute particulars; which I think he cannot be expected to do. Our judgment, therefore, must be for the defendants.

Parke, B.—I am of the same opinion. I think, that, if the engineer had wished the plaintiff to do some particular kind of work, as, for instance, to pull down and rebuild

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some portion of the work, the notice should have specifically stated to what extent he required the particular work to be done. But here the objection of the engineer is, that the work in general is done in a negligent and sluggish manner. It is, therefore, sufficient for him to give a general notice of this description. He tells the plaintiff he is proceeding in a negligent and slow manner, and requires him to do the work better, and with more expedition. Such a notice is good.

ALDERSON, B.—If issue were taken on the notice, I agree, that the defendants would fail if they meant to say that the plaintiff should have made some alteration in his work; but if they intended to say that the plaintiff got on too slowly with the work, and that he had not provided sufficient materials for it, and that such a state of things lasted for seven days after the notice had been given, the defendants would prove their plea (a).

Judgment for the defendants.

(a) *Martin*, B., had left the Court.

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PORRITT v. BAKER and Another.

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declaration stated, that, in consideration that the plaintiff, at the request of the defendants, would deliver to the defendants eight pheasants in good feather, and would pay the defendants 5s. for each pheasant which the plaintiff required, when he required them, the defendants agreed with the plaintiff to deliver to him eight pheasants if he required them; and although the plaintiff did all that was necessary on his part, and all things necessary happened to entitle him to have eight pheasants delivered to the defendants, and a reasonable time for the delivery of the said eight pheasants by the defendants to the plaintiff had elapsed, yet the defendants did not deliver to the plaintiff eight pheasants as aforesaid, but neglected and refused to do so.

—“That at the time of the making of the said promise herein mentioned, and thence hitherto, the defendants were and are licensed to deal in game, by virtue of an Act passed in the session of Parliament holden in the 1st & 2nd years of the reign of his late Majesty William 4, by the title of ‘An Act to amend the Laws in England relative to Game.’ And the plaintiff at the time of the making of the said promise had notice of the defendants being so licensed; and the said contract and promise was made by the plaintiff with the defendants in the way of their business as

A licensed dealer in game is not prohibited by the 1 & 2 W. 4, c. 32, from entering into a contract made in the season to deliver live game out of a mew or breeding-place at any time of the year.

A declaration stated, that, in consideration that the plaintiff would deliver to the defendant eight pheasants in good feather, and would pay the defendant 5s. for each pheasant which the plaintiff required, when he required them, the defendant promised the plaintiff to deliver him eight pheasants when he required them.—Breach: the non-delivery

of the defendant to the plaintiff of the eight pheasants. Plea, that the contract was made with the defendant in the way of his business as a licensed dealer in game, under the 1 & 2 W. 4, of which the plaintiff had notice, and that the promise was to deliver the pheasants any time of the year, and that the request to the defendant to deliver the said pheasants was made after the expiration of ten days, one inclusive and the other exclusive, 1st of February, 1854, and before the 1st of October in that year, when it was contained in the statute that the defendant should knowingly have in his possession any game at that time.—*Held*, on demurrer, that the plea was bad, as it was consistent with it that the plaintiff had entered into a contract in the season to deliver living pheasants; and further, that the plea did not allege that the pheasants were to be delivered within the time specified by the statute.

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such licensed dealers in game ; and the said promise was to deliver the said pheasants at any time as well before as after the expiration of ten days from the 1st of February, contrary to the form of the statute in such case made and provided ; and the defendants further say, that the request or requisition by the plaintiff to the defendants to deliver the said pheasants was made after the expiration of ten days (one inclusive and the other exclusive) from the 1st of February, 1854, and before the 1st of October in that year, and at a time when it was contrary to the form and effect of the aforesaid statute that the defendants should knowingly have in their house, shop, stall, possession, or control, any kind of game whatever, within the meaning of the said statute."

Demurrer and joinder.

Pashley appeared to support the demurrer, but was stopped by the Court ; who called upon

Hawkins to support the plea.—The validity of the plea turns upon the construction of the 4th sect. of the 1 & 2 Will. 4. c. 32. That section enacts "that if any person

me kept in a mew or breeding place) after the expiration of forty days (one inclusive and the other exclusive,) the respective days in each year in which it shall be unlawful to kill or take such birds of game respectively as aforesaid; every such person shall, on conviction by such offence before two justices of the peace, for and pay for every head of game so bought, or sold, and in his house, shop, possession, or control, such sum not exceeding 1*l*., as to the convicting justices seem meet, together with the costs of conviction."

ock, C. B.—Does not this section apply to *dead* game?

What reason is there why a nobleman or gentleman should not be at liberty to purchase game at any time of year, for the purpose of stocking his preserves? The act was framed for the purpose of preventing the depletion of game at a certain season of the year.] The question is, whether the plea falls within the language and intention of the statute. Prior to this statute, dealing in game was illegal. The 3rd section enumerates the different kinds of game which are to be considered as game, and amongst them it names "pheasants." The 17th and 18th sections contain provisions as to the persons entitled to sell and deal in game. And it is submitted, that the statute applies equally to live and dead game. [*Parke, B.*—There are 6 & 7 Will. 4, c. 65, and 2 & 3 Vict. c. 35, upon the subject.] Those statutes do not affect this question.

ke, B.—The statute does not prohibit a gentleman entering into a contract during the season with a licensed dealer for the purchase of a live pheasant, to be delivered out of the dealer's mew at any time. If this be established, the plea is bad for not excluding such a case.] The defendants contend, that the contract which provides for the delivery of the bird at any time is prohibited and illegal. [*Alderson, B.*—The plea merely states that the contract to deliver was made within the prohibited time, and does not allege that the delivery was within that time.]

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time. It is consistent with the plea that the bargain was lawful.]

PARKE, B.—The plea is bad; it does not meet the supposed case of the delivery of a living or dead pheasant in the season. A dealer may make a contract to deliver at any time a living pheasant taken by him out of his own mew or breeding place, or from that of a person from whom he has purchased it during the season. Our judgment, therefore, must be for the plaintiff.

POLLOCK, C. B., ALDERSON, B., and MARTIN, B., concurred.

Judgment for the plaintiff.

Jan. 24.

WARWICK and Another v. NAIRN.

To an action by the drawer against the acceptor of a bill of exchange for 313*l.* 12*s.* 9*d.*, the defendant pleaded, except as to 108*l.* 15*s.* 3*d.* parcel, that the bill was drawn and accepted in respect of the price of certain goods sold by the plaintiffs to the defendant, and for no other debt; that, at the time of sale, the plaintiffs promised the defendant

THE first count of the declaration was on a bill of exchange, dated the 20th of February, 1854, for 313*l.* 12*s.* 9*d.*, payable six months after date, drawn by the plaintiffs on the defendant, and accepted by him.—There was also a count upon accounts stated.

Plea—As to the plaintiffs' claim, except as to the sum of 108*l.* 15*s.* 3*d.*, parcel thereof, that the bill of exchange in the declaration mentioned was drawn and accepted, and the accounts in the declaration alleged to have been stated were stated, for and in respect of the price of certain manure sold and delivered by the plaintiffs to the defendant and at his request; and of certain other goods, to wit, residuum, saltpetre, and bags or sacks sold and delivered by the plaintiffs to the defendant and at his request, and not for or in respect of any other debt or consideration what-

that the goods should be of a certain quality; that he bought the goods and accepted the bill on the faith of the plaintiffs' promise; that the goods delivered were not of the quality specified but of inferior quality, and that they were of the value of 108*l.* 15*s.* 3*d.* and no more; and that, save as aforesaid, there never was any value or consideration for the making or accepting the said bill of exchange:—*Held*, on demurrer, that the plea was bad.

that, before and at the time of the said sale and of putting the said bill and stating the said accounts, the plaintiffs produced and shewed to the defendant a printed statement, purporting to be an analysis of certain manures, specifying the descriptions and qualities thereof respectively, and the plaintiffs then promised him that the manure so sold and delivered as aforesaid, being one of the manures mentioned and described in the said statement, and should be equal in quality to the manure of the same description mentioned in the said statement; that the defendant then bargained for and bought the said manure, which was so sold and delivered as aforesaid, and said other goods, which were so sold and delivered as aforesaid, and that he accepted the said bill of exchange, and stated the said accounts on the faith of the said promise of the plaintiffs, and not otherwise; and further, that the said manure so sold and delivered to the defendant as aforesaid was not, nor was any part thereof, at the time of the said sale thereof or at any time, equal in quality to the manure of the same description mentioned in the said statement, but on the contrary thereof the same was, and any part thereof was, of a very inferior and much worse quality, and of much less value; and that the manure so sold and delivered to the defendant as aforesaid was of the value of £10s. only and no more, and that the agreed price of said other goods so sold and delivered to him as aforesaid was the sum of 32*l.* 5*s.* 3*d.* and no more; which said sums of 76*l.* 10*s.* and 32*l.* 5*s.* 3*d.* make together the sum of 108*l.* 15*s.* 3*d.* and no more; and that save as aforesaid there never was any value or consideration whatever for the making or accepting of the said bill of exchange, or stating the said accounts.

Demurrer and joinder.

Hill, in support of the demurrer.—The plea is bad, such a partial failure of consideration cannot be

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pleaded to an action on a bill of exchange or promissory note. The plea does not even allege that the manure complained of became of less value by reason of a breach of the contract, to the extent of the amount which the plea professes to answer. [*Parke*, B.—The subject-matter of the plea has been held on several occasions to afford no defence to an action on a bill of exchange. *Morgan v. Richardson* (a) and *Trickey v. Larne* (b), are direct authorities against the plea.]—He was then stopped by the Court.

Manisty contra.—The question is, whether the strict rule which formerly precluded a defence like the present from being pleaded to a bill of exchange is not relaxed. In *Mondel v. Steel* (c), *Parke*, B., in delivering the judgment of the Court, said, "Formerly, it was the practice, where an action was brought for an agreed price of a specific chattel, sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross action for breach of the warranty or contract; in which action, as well the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage, might have been recovered." His Lordship then proceeded to state, that the rule referred to has been relaxed. There is no reason why the more liberal rule adopted in actions for goods sold and delivered should not be applicable to actions on bills of exchange. If the plaintiff had sued upon the consideration for the bill, this defence would have been clearly good. It prevents circuity of action, and a party is not taken by surprise, as the defence is on the record. [*Pollock*, C. B.—The payment by a bill of exchange is to be taken as the payment of so much cash; the defendant ought to satisfy the bill and proceed upon the remedy for the breach of warranty. *Parke*, B.—

(a) 7 East, 482, n.; 1 Camp.
40.

(b) 6 M. & W. 278.
(c) 8 M. & W. 858.

The defendant in fact disputes the authority of those cases to which I have referred. Can any authority be shewn which is opposed to them? In *Forman v. Wright* (a), to a count on a promissary note for 32*l.* 6*s.* 10*d.* the defendant pleaded, as to 21*l.* 11*s.* 11*d.*, parcel, that before the making of the note he was indebted to one F. in the sum of 10*l.* 14*s.* 11*d.*, and no more; that the plaintiff *fraudulently, deceitfully*, and falsely represented to the defendant that there was due from the defendant to F. the sum of 32*l.* 6*s.* 10*d.*; and then demanded of, and by means of such representation as aforesaid induced, the defendant to deliver to him the note in the count mentioned. At the trial, it was found by the jury that the note was obtained by a *false* representation by the plaintiff that 32*l.* 6*s.* 10*d.* was due, but that such representation had been made *without fraud*. It was held, that the plea was proved, for that the words "fraudulently and deceitfully" might be rejected, and that the plea was in substance a plea of partial failure of consideration. Where the consideration for a bill of exchange is divisible, the defendant may plead to one part of the consideration the failure of it. [*Parke, B.*—That is not so here.] Still that is to be considered as certain and ascertained which may be rendered certain.

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H. Hill was not called on to reply.

PER CURIAM (b).—The plaintiffs are entitled to judgment. The authorities are decisive that this plea is bad. If the defendant seeks to have them overruled he must take the case to the Court of Error.

Judgment for the plaintiffs (c).

(a) 11 C. B. 488.

(c) See *Sully v. Frean*, ante,

(b) *Pollock, C. B., Parke, B.,* p. 535.
Alderson, B., and Martin, B.

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Jan. 25.

PELL, Assignee of the Estate and Effects of COUCH, and Insolvent Debtor, *v.* SHEARMAN and Others.

The defendants covenanted with the plaintiff, that if he would surrender to his lessor a certain lease, they would, within two years, or within such period as should be agreed in a new lease, which the lessor had agreed to grant to them, sink upon the demised premises a pit to the depth of 130 yards in search of coal, and in case a marketable vein of coal should be reached, pay to the plaintiff 2500*l.* The plaintiff having sued the defendants for a breach of this covenant, gave evidence to shew that if the defendants had sunk the pit, marketable coal might have been found:—*Held*, that the plaintiff was entitled to more than nominal damages, and that the true measure of damage was the amount which he had lost by being deprived of the opportunity of finding marketable coal.

COVENANT—The declaration stated, that before the estate and effects of Couch became vested in the plaintiff as assignee, the defendants covenanted by deed with Couch that if he should, with the concurrence of J. Nunn, surrender to Sir C. Morgan the residue of a term of thirty years, granted by an indenture of lease of the 20th February, 1846, then and in such case the defendants, some or one of them, would within two years, to be computed from the 20th of September, 1847, or within such period of time as should be agreed in a new lease, which the said deed stated that Sir C. Morgan had agreed to grant to the defendants, sink in and upon the farms, lands, hereditaments, and premises which should be described or referred to in the said new lease, a pit or pits to the lower veins of coal, or to the depth of one hundred and thirty yards from the level of the Taff Vale Railway at the Ddaranddu Tip, in search of the same; and also should and would, in case by the sinking of such pit or pits to such lower veins or depths as aforesaid, a marketable vein of coal, capable of being worked under the terms and conditions of the aforesaid new lease, should be reached, well and truly pay or cause to be paid to the said Couch the sums of 250*l.* and 2000*l.*, with interest for the latter sum, and without any deduction or abatement whatsoever out of the same sums and interest (that is to say), the sum of 250*l.* immediately after such marketable vein should have been so reached as aforesaid, and the sum of 2000*l.* at the expiration of twelve calendar months after such marketable vein of coal should have been so reached as aforesaid, with interest for the same sum of 2000*l.* after the rate of 4*l.* for every 100*l.*, compute

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from the day on which such marketable vein should have been so reached as aforesaid. Averments—That Couch and the plaintiff have done all things necessary to entitle them to have such pit or pits sunk; and all things necessary in that behalf have happened, and all necessary times in that behalf have elapsed, and such new lease was granted; and that the period of time agreed in the new lease for sinking such pit or pits was four years, to be computed from the 29th of September, 1847, which period expired before the vesting of such estate and effects, as aforesaid. Breach—That the defendants did not sink in or upon the said farms, lands, hereditaments, and premises described or referred to in the said new lease so granted, as aforesaid, a pit or pits to such lower veins of coal, as aforesaid, or to the depth of one hundred and thirty yards from the level of the Taff Vale Railway at the Ddaranddu Tip, in search of the same; by reason whereof the chance of finding such marketable vein of coal as in the said deed mentioned, and the plaintiff's chance of being entitled to the said sums of 250*l.* and 2000*l.* on the finding of such marketable vein was wholly lost, and the defendants have not paid those sums either to Couch or the plaintiff (*a*).

At the trial, before *Maule, J.*, at the last Northampton Summer Assizes, it was proved that the defendants had entered into the covenant set out in the declaration, and had failed to sink a pit in pursuance of it. The plaintiff called as a witness a mineral surveyor, who stated that he was acquainted with the neighbouring collieries, and that, in his opinion, a marketable vein of coal might have been found by sinking a pit to the depth of one hundred and thirty yards. It appeared that the cost of sinking such a pit would be about 2600*l.* There was annexed to the covenant a proviso, that if the defendants, in pursuance of

(*a*) The pleas, which are immaterial to the present question, were all found against the defendant.

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the covenant, sunk a pit to the depth of one hundred and thirty yards, and did not there reach a marketable vein of coal, then if they thought fit to continue the pit to a lower depth, Couch would pay them one-fourth of the expense of such further sinking.

Under these circumstances, it was submitted on behalf of the defendants, that the plaintiff was entitled to nominal damages only. The learned Judge told the jury, that the plaintiff had a right to have a pit sunk to the depth of one hundred and thirty yards at the cost of the defendants, and that if they had done so they would have expended 2600*l.*, even though they found no coal; and that if they reached a marketable vein of coal, they would have been liable to pay to the plaintiff 2500*l.*; and therefore as they had failed to perform a work which the plaintiff had a right to have done at their cost, and which might have produced him 2500*l.*, the jury ought either to estimate the damages with reference to the cost of sinking the pit, or give the amount which might have become payable under the covenant in the contingency therein mentioned. The jury assessed the damages at 2500*l.*, and leave was reserved to the defendants to move to reduce the damages to a

[*Parks*, B.—In this case, there is difficulty in making the cost of sinking the pit the measure of damage, because the plaintiff cannot go upon the land and make the pit. If he had been the owner of the soil, the criterion of damage would have been the expense of putting him in the same situation as if the defendants had performed their contract; and then he would only have had to spend the money in sinking the pit.] In the ordinary case of non-delivery of goods, the party to whom they ought to have been delivered has a right to purchase similar goods and recover as damages the difference between the contract price and the market price at the time of the breach of contract. Here, the only mode of compensating the plaintiff is either to give him the amount which the defendants must have expended if they had performed their contract, or the sum which he would have obtained if marketable coal had been got. [*Pollock*, C. B.—It certainly is not a case for nominal damages.] If the jury had computed the damages on a different principle, they would have acted contrary to the evidence, which shewed that marketable coal might have been found if the defendants had performed their contract.—The Court then called on

Mellor, *Hayes*, and *Brewer* to support the rule.—The learned Judge ought to have left it to the jury to estimate the defendants' chance of getting merchantable coal. Though the pit was sunk 130 yards, merchantable coal might not have been found at that depth, and if it was not, there was another contingency which would reduce the amount which the plaintiff might ultimately be entitled to, viz. that the defendants had the option of sinking the pit deeper, and charging the plaintiff with one-fourth of the expense. Therefore, in the one event, the plaintiff would be entitled to nothing, and in the other to a less sum than 2500*l*. The plaintiff can only claim compensation for the damage which he has actually sustained, and that is merely

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nominal. In trespass for cutting into the plaintiff's close and carrying away the soil, the measure of damage is the value to the plaintiff of the land removed, and not the expense of restoring it to its original condition: *Jones v. Gooday* (a). Here the sinking of the pit might have been of no value whatever to the plaintiff. [Parke, B.—There was evidence that merchantable coal might have been got; and if the jury believed that, the measure of damages is what the plaintiff has lost by the defendants' not getting it.]

POLLOCK, C. B.—I am of opinion that the rule ought to be discharged. There was evidence on the part of the plaintiff, that if the pit had been sunk marketable coal would have been found, and no witness was called by the defendants to contradict the plaintiff's evidence; therefore we ought not to grant a new trial. I am, however, by no means prepared to say that the direction of the learned Judge was wrong. The plaintiff is certainly entitled to recover more than nominal damages; and whether they are estimated with reference to the cost of sinking the pit or the amount which the plaintiff would have been entitled to if marketable coal had been found, it seems to me that

been instrumental in preventing the discovery of marketable coal, they ought to pay the plaintiff such an amount as he has lost by their neglect to perform their covenant.

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ALDERSON, B.—I am of the same opinion. The plaintiff has lost the advantage of having a pit sunk to the depth of 130 yards at the costs of the defendants; and he has also lost a chance, amounting to a certainty, of finding marketable coal; he is therefore entitled to recover either the amount which the defendants would have expended in sinking the pit, or the amount which would have become payable if marketable coal had been found. That was a question for the jury, and I think that the finding is quite right.

MARTIN, B.—It seems to me that the summing up of the learned Judge was correct. The plaintiff ought to recover what he has lost by the defendants' breach of contract.

Rule discharged.

CORNWELL v. THE METROPOLITAN COMMISSIONERS OF
SEWERS.

Jan. 23.

THE declaration stated, that, before and at the time of the committing of the grievance, &c., the defendants were the possessors of and had the control and management of a certain sewer, situate in a public highway, called Hourglass-lane, in the parish of St. Mary, Newington, in the county of Surrey; and that, whilst they were so possessed, and had the control and management of the said sewer, they wrongfully

Commissioners of Sewers used for the purpose of their sewerage an ancient tidal ditch which ran along the side of a public highway:—*Held*, that the Commission-

ers were under no obligation to fence the sewer, so as to protect persons frequenting the highway.

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and unlawfully permitted and suffered the said sewer to be left and remain open and unprotected, contrary to their duty in that behalf, and omitted properly and securely to fence the same, and to continue the same properly and securely fenced; and the said sewer being then so open and unprotected, the plaintiff, whilst lawfully driving a carriage along the public highway, was, together with the horse drawing the said carriage, precipitated into the said sewer, whereby the plaintiff was grievously hurt, &c.

Pleas—First, not guilty (by statute 11 & 12 Vict. c. 112, ss. 127, 128); Secondly, that the defendants were not possessed of, nor had the control or management of the said sewer, as alleged.—Upon which issues were joined.

At the trial, before *Pollock*, C. B., at the last Surrey Assizes, it appeared, that on the 3rd of April, 1854, about midnight, the plaintiff was driving a cab along a public highway called Hen-and-Chicken-lane, Walworth, which leads at right angles to another highway called Hourglass-lane, when the horse took fright, and instead of turning to the left, as the plaintiff tried to make him, went straight across Hourglass-lane into an open ditch or sewer, which ran along the side of it, and the plaintiff was thrown over

left it to the jury to say whether the injury to the plaintiff was caused by his driving an unmanageable horse, or by the unprotected state of the sewer. The jury found a verdict for the plaintiff, with 40*l.* damages; and leave was reserved to the defendants to move to enter a nonsuit.

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SEWERS.

Montagu Chambers, in the following Term, obtained a rule nisi accordingly; against which

Hawkins shewed cause (Jan. 20).—It was the duty of the defendants to fence the sewer in question. The 11 & 12 Vict. c. 112, s. 7, vests in the Commissioners of Sewers all sewers within the limits of their commission. The 37th section enacts, “that all such sewers, drains, watercourses, &c., shall be subject to the survey, order, and control of the Commissioners.” The 38th section empowers the Commissioners from time to time to repair the sewers vested in them. The effect of these enactments is to give the Commissioners the entire possession, control, and management of this sewer. [*Pollock*, C. B.—Assuming that the Commissioners were the owners of the sewer, they were under no obligation to protect the highway. The owner of land adjoining a highway is not bound to fence a pit on his land. In this country there are some hundreds of miles of highways, on the sides of which there are ditches; but nobody ever supposed that the owners were under any obligation to fence them.] There is no distinction in principle between this case and that of a person who leaves unprotected an area adjoining a public highway. In *Coupland v. Hardingham* (a), Lord *Ellenborough* ruled, that it was the duty of the occupier of a house having an area fronting a public street, so to fence it as to make it safe to passengers; and that it was no defence to an action for injury caused by his neglect to do so, that, when he took possession of the house,

(a) 3 Camp. 397.

the area and was killed ; and it was held, that the land was liable. [*Martin*, B.—That he succeeded on the ground that the defendant's excavation adjoining an immemorial public way rendered the way unsafe to those who used it with care, and so was guilty of a public nuisance. —This sewer was not dug by the Commissioners, but an ancient dyke of which they availed themselves. B.—It is the case of a road dedicated to the public use, with a sewer beside it.] There is no provision in the Act, 5 & 6 Will. 4, c. 50, to compel the commissioners to fence this road. [*Martin*, B., refers to *Whitney (b)*.] That is the only case in which it is suggested that the parish are bound to fence the road, but it shews that here the parish are not liable. The road being dangerous, not from any defect in itself, but from the existence of the adjoining sewer, the obligation to protect the public is by law cast on the persons under whose management the sewer is. [*Alderson*, B.—] Did the commissioners make the road dangerous? Suppose there is a public yard, with several dangerous holes in it, and the commissioners allow the public to go through the yard, do they owe him any obligation to fill up the holes? Under the circumstances, *caveat viator*. *Parker*, B.—This is the case of a new sewer, and therefore we may

ct to the sewer. *Martin*, B.—In the case of *Coupland Hardingham* (a), in all probability the road had been sed long before the house was built.]

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Montagu Chambers and *Bovill* appeared to support the rule, but were not called upon to argue.—They referred to *Ricketts v. The East and West India Docks, &c., Railway Company* (b).

PER CURIAM (c).—The rule must be absolute to enter a nonsuit.

Rule accordingly.

(a) 3 Camp, 397.
(b) 12 C. B. 160.

(c) *Pollock*, C. B., *Parke*, B.,
Alderson, B., *Martin*, B.

END OF HILARY TERM.

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HILARY VACATION, 18 VICT.

Feb. 22.

DOBIE *v.* LARKAN.

To an action on a bill of exchange for 50*l.*, drawn by M. upon and accepted by the defendant, and by M. indorsed to the plaintiff, the defendant pleaded—

first, that the bill was drawn by M. and accepted by the defendant, and indorsed by M. to the plaintiff, and the plaintiff first held the same for the special purpose of getting the same discounted, and to hand the proceeds thereof to the defendant; that the plaintiff, acting in fraudulent collusion with M., got the bill discounted, and, contrary to and in violation of the special purpose for which the bill was drawn, accepted, and indorsed, and for which the plaintiff first held the same, handed to the defendant 17*l.* and no more, being part of the proceeds thereof; and that there never was any other consideration for the acceptance by him of the bill, or for the plaintiff being the holder thereof: Secondly, as to 17*l.*, a tender of that amount:—*Held*, on motion for judgment non obstante veredicto, that the first plea, though informal, was good in substance, since it confessed a *prima facie* title in the plaintiff by indorsement, and avoided it by shewing that he was the holder of the bill for a special purpose only, and without consideration.

Also, that the second plea was bad, for the acceptor of a bill of exchange cannot plead a tender after the day of payment.

A plea of tender ought not to be joined with a plea containing a denial of the right of action for the same sum.

DECLARATION on a bill of exchange, drawn by A. Mouat upon and accepted by the defendant, for payment to the order of A. Mouat of 50*l.*, four months after date, and by A. Mouat indorsed to the plaintiff.

Pleas—First. That the bill of exchange mentioned in the declaration was drawn by A. Mouat and accepted by the defendant, and indorsed by A. Mouat to the plaintiff, and the plaintiff first held the same, for the special purpose of getting the same discounted at a reasonable discount price in that behalf, and to hand the proceeds thereof to the defendant for his own sole use and benefit; but the defendant says, that the plaintiff acting in fraudulent collusion with A. Mouat, got the said bill of exchange discounted, and, contrary to and in violation of the said special purpose for which the said bill of exchange was drawn, accepted, and indorsed, and for which the plaintiff first held the same, handed to the defendant the sum of 17*l.* and no more, being part of the proceeds thereof. And the defendant further says, that there never was any other or

er consideration for the acceptance by him of the said of exchange, or for the plaintiff's being the holder of.

cond. And for a second plea to the declaration, as to said sum of 17*l.*, parcel &c., the defendant says, that, at the commencement of this action, he tendered and paid to the plaintiff the sum of 17*l.*, parcel &c., and is ready and willing to pay to him the same.—Upon both pleas issues were joined.

The cause was tried before *Erle, J.*, at the last *Essex* assizes; when a verdict was found for the defendant on both

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Willes, in the following Michaelmas Term, obtained a writ nisi for judgment for the plaintiff non obstante veredicto; against which

Wash shewed cause (January 20).—It appears on the record that the plaintiff never was entitled to more than 17*l.*, and that amount was tendered to him. [*Parke*, C. J. The second plea is clearly bad. The meaning of a tender is, that the party has performed his contract, so far as he was able. The contract of the acceptor of a bill is to pay it on the precise day when it becomes due, and he cannot plead a tender of the money afterwards. The only question is, whether the first plea shews an answer to the *prima facie* title of the plaintiff's indorsement]. The plea shews, that the plaintiff was the indorsee of the bill so as to pass the property in it to him, but that the bill was indorsed in blank and handed over to him for a special purpose only; he was not a mere agent for the purpose of getting it discounted. It is consistent with every allegation in the plea, that the plaintiff had no title whatever to sue on the bill.

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Willes in support of the rule:—*Poole v. Tumbidge* (a) and *Hume v. Peploe* (b), are express authorities that the acceptor of a bill of exchange cannot plead a tender of the amount after the bill became due. Then with respect to the first plea,—there is a manifest distinction between the case of a bill of exchange wrongfully obtained and the wrongful application of the proceeds of a bill rightfully obtained. That distinction is illustrated by *Palmer v. Jarmain* (c), where it is laid down, that, if a party, authorised by the holder of a bill of exchange to get it discounted and to apply the proceeds in a particular way, does get it discounted, but misapplies any part of the proceeds, he cannot be sued in trover for the bill, but must be sued for money had and received. If it were otherwise this consequence would follow,—that the defendant might recover from the plaintiff the remainder of the proceeds, and the plaintiff would be unable to enforce payment of the bill, though he gave value for it. Moreover, the plea merely states, that “the plaintiff *first* held the same for the special purpose,” &c., without negating the fact that the plaintiff indorsed it over, and got it back from a person who gave value for it. Again; the plea does not exclude the case of consideration as between the defendant and Mouatt, in which case the plaintiff, though the holder without value, might sue for the benefit of Mouatt. Or it may be, that Mouatt took up the bill while in the hands of a bona fide holder, and indorsed it to the plaintiff. The plea can only be good as an argumentative denial of any indorsement to the plaintiff. But it is not capable of that construction, for it alleges that the bill was indorsed to the plaintiff for the purpose of getting it discounted; and then it goes on to say, that the plaintiff got it discounted, and that the proceeds were more than 17*l*. The plaintiff

(a) 2 M. & W. 223.

(b) 8 East, 168.

(c) 2 M. & W. 282.

therefore has a right to rely on the title of the person who discounted it.

Cur. adv. vult.

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PARKE, B.—In this case, a motion was made by Mr. *Willes* for judgment non obstante veredicto on two pleas found for the defendant. (His Lordship stated the pleadings, and proceeded). These pleadings are very inartificial. The second plea to part of the declaration, of the tender of 15*l.*, is clearly bad in itself, because a tender after the day when the bill became due by the acceptor of a bill of exchange is undoubtedly bad. The plea of tender is in truth a plea of performance of the contract, as far as the party contracting can perform it, and where money is to be paid, the debtor cannot pay it unless the creditor will receive it; a tender, therefore, at the time it is due is sufficient, because it is a payment as far as a debtor can pay, but a tender afterwards is too late. The case of *Poole v. Tumbidge* (a) is a decisive authority upon this point. The plea of tender also could not be joined with a denial of the right of action for the same sum in another plea, and might have been objected to with success.

But the defendant relies entirely on the first plea, which is indeed very informally drawn; but the question arising after verdict is whether it is now bad, and contains a sufficient confession of the right of action in the declaration, and an insufficient avoidance of it; after verdict every reasonable intendment is to be made in favour of the plea. The plea certainly does contain a sufficient confession of the indorsement to the plaintiff, in point of fact, which gives a *prima facie* title, and that is all that, under the system of pleading introduced by the new rules, is required: *Couper v. Garbett* (b).

(a) 2 M. & W. 223.

(b) 13 M. & W. 40.

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The only question is, whether the plea contains avoidance of that *primâ facie* title? It contains a good deal of surplusage, and leads to the impression that the pleader supposed it to be an answer to all but 17th only, and relied on the tender as an answer to that. But on considering it accurately, it does appear to us that it contains an answer to the *primâ facie* title by *indorsement*. In substance the plea says,—the bill was indorsed to you either by special indorsement, or an indorsement in blank coupled with a delivery, so as to make you the legal holder of the bill *primâ facie*; but it was indorsed to you and also drawn by Mouatt, and accepted by me, and first held by you, for the special purpose of getting the same discounted, and handing over the proceeds for my sole use, and there never was any other or further consideration for my being the acceptor, or you being the holder. The plaintiff's title therefore was as a mere holder for a special purpose; and he could not sue himself, for his own benefit, so long as he held the bill for that purpose, and unless he had acquired a new title for value; and the plea avers that he never did.

But then it is said, that Mouatt may have given value for it afterwards to the defendant, and the plaintiff, though holder without value, might sue for the benefit of Mouatt; but if so, there must have been some other subsequent consideration for the defendant's acceptance in favour of Mouatt; and the plea negatives that.

It may also be said, that the plaintiff may, in order to get the bill discounted, have pledged his own name as indorsee, which may have been within the scope of his authority; but then he could not sue unless he had taken up the bill by paying the amount to the holder. But so, there would have been further consideration for him being the holder; and the plaintiff negatives it. The plea though informal, is good on this motion.

Rule discharged.

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WATSON v. HUMPHREY and LEE.

Feb. 8.

BY order of *Martin*, B., the following case was submitted for the determination of this Court.

On the 13th of April, 1854, the defendant, Isaac Humphrey, by the judgment of this Court, recovered against the plaintiff, Ephraim Watson, the sum of 95*l.* 18*s.*, the amount of damages and costs in an action before then brought by Humphrey against Watson, for breaking and entering a close and taking away certain straw, the property of Humphrey.

On the 5th of May, 1854, Watson was taken in execution, by virtue of a writ of *capias ad satisfaciendum*, issued by Humphrey upon his said judgment, and committed to the county gaol of Suffolk; and upon the 13th of May, 1854, Watson presented his petition to the Court for the Relief of Insolvent Debtors, praying to be discharged from custody.

On the 26th of June, 1854, the petition of Watson was duly heard before the Judge of the Court for the Relief of Insolvent Debtors acting in the county of Suffolk. Humphrey appeared before the Judge upon the hearing of the petition, and opposed the discharge of Watson from custody, and in the event of his discharge, applied to be appointed assignee of his estate under the petition; but the Judge ordered and declared that Watson was entitled to his discharge from custody, under the provisions of the Act 1 & 2 Vict. c. 110; and Watson was, by virtue of the said order, on the said 26th of June, discharged from the custody of the gaoler of the county gaol of Suffolk accordingly; and the Judge refused to appoint Humphrey the assignee of the estate of Watson, and appointed two other creditors of Watson joint assignees of the estate; and which appointment was afterwards con-

The debt of a trader discharged out of custody under the Insolvent Act, 1 & 2 Vict. c. 110, is a good and sufficient petitioning creditor's debt, to support a fiat in bankruptcy against him under the 39th section of that Act.

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firmed by the Commissioners of the Insolvent Debtors Court in London.

Watson was a trader within the meaning of the laws relating to bankrupts, and committed an act of bankruptcy on the 13th of May, 1854, by filing his said petition in the Court for the Relief of Insolvent Debtors. On the 14th of July, 1854, and after Watson was discharged from custody under the execution issued by Humphrey by virtue of the order of the said Judge made under the 1 & 2 Vict. c. 110, Humphrey filed a petition for adjudication of bankruptcy, in the Court of Bankruptcy, London, against Watson, under "The Bankrupt Law Consolidation Act, 1849," and Watson was thereupon adjudicated bankrupt.

The debt in respect of which Humphrey petitioned the Court of Bankruptcy for adjudication against Watson, and upon which the adjudication was founded, was the debt for which judgment was recovered by Humphrey on the 13th of April, 1854, and for which Watson was so taken in execution, and committed to the county gaol of Suffolk as aforesaid. The judgment so recovered by Humphrey was, at the time of the said adjudication of bankruptcy, unpaid and unsatisfied, except as aforesaid.

On the 9th of August, 1854, Humphrey was appointed by the Court of Bankruptcy the creditors' assignee, and the defendant Lee was appointed the official assignee of the estate and effects of the bankrupt under the said petition for adjudication. Humphrey, as such creditors' assignee, before the commencement of this action, seized and converted certain property which had belonged to Watson before his bankruptcy.

The question for the determination of the Court was, whether, under the circumstances above stated, the debt due to Humphrey upon the judgment recovered in this Court, on the 13th of April, 1854, was a good and suffi-

cient petitioning creditor's debt to support an adjudication of bankruptcy. If the Court should be of opinion that it was not, judgment was to be entered in this action for the plaintiff, with 1s. damages. If the Court should be of opinion that it was, judgment was to be entered for the defendants.

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Cowling for the plaintiff—An execution under a ca. sa. is a satisfaction of the debt, and prevents it from afterwards being a good petitioning creditor's debt, which must be a legal debt: *Hope v. Meek* (a). *Cohen v. Cunningham* (b) decided that a judgment creditor who has taken his debtor in execution, cannot afterwards sue out a commission of bankrupt against him upon the same debt. *Burnaby's case* (c) is also an authority to that effect. [*Parke, B.*—Those cases are beyond all doubt, because there the creditor had the debtor in execution at the time he sued out the commission. This case turns on the effect of the discharge under the Insolvent Act.] It is material to consider, in the first place, what was the effect at common law of the discharge of an execution debtor. At common law, execution of the body was an absolute satisfaction of the debt, so that the creditor could not afterwards resort to any other legal remedy. The principle was, that the liberty of the subject was of such inestimable value that a creditor who infringed it was considered as having received satisfaction for the debt. The act of God, as for instance, the death of the debtor in execution, made no difference; and where the debtor's discharge was in invitum, as by an escape, either negligent or wilful, the creditor could have no other execution; even though he was deprived of his remedy against the sheriff by the sheriff's death: *Foster v. Jackson* (d). So if the creditor consented to his debtor's discharge on

(a) Post, p. 829.

(b) 8 T. R. 123.

(c) 1 Stra. 653.

(d) Hob. 52.

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his undertaking to pay at a future day, he could not in default of payment sue out *any* execution on that judgment: *Tanner v. Hague* (a). In the case of the death of the debtor in execution, a remedy was provided by the 21 Jac. 1, c. 24. Then what is the effect of a discharge under the Insolvent Act, 1 & 2 Vict. c. 110? It being a discharge by the act of law its effect will be the same as a discharge in that manner at common law, unless the Legislature has otherwise provided. The 75th section of the Insolvent Act enables the Court, upon the prisoner's swearing to the truth of his schedule, and executing such warrant of attorney as is thereafter directed, to adjudge that such prisoner shall be discharged. There is nothing in that section to shew that the ordinary consequence of a discharge shall not take place as regards the execution creditor. By the 87th section, before adjudication, the prisoner is required to execute a warrant of attorney to enter up judgment against him for the amount of the debts in his schedule. So that not only the present, but the future property of the insolvent is made available for the payment of his debts. The Legislature has, therefore, given a compensation to the creditor for the debtor's discharge; and could never have intended that the creditor, having that benefit, should resort to another remedy. [*Parke, B.*—The warrant of attorney is only a collateral security, and cannot be enforced unless the Court is of opinion that the insolvent is able to pay. In *Jellis v. Mountford* (b), it was held that a creditor of an insolvent trader might, after his discharge under the 55 Geo. 3, c. 102, take out a commission of bankruptcy against him, and that his debt, although included in the insolvent's schedule, was a sufficient petitioning creditor's debt to support the commission.] There the petitioning creditor was not the person who had taken the debtor in execution. [*Martin, B.*—The 39th section renders the filing of a petition by a

(a) 7 T. R. 420.

(b) 4 B. & Ald. 256.

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actual custody an act of bankruptcy, and enacts issued within two months from the making of the order, "whether upon the petition of such prisoner, or upon the petition of *any such creditor as aforesaid*," shall vest the estate and effects of the prisoner out of the possession of the prisoner into the hands of the assignees. Then, who are meant by the term "any creditor as aforesaid?" If the 36th, 37th, and 38th sections are referred to, it will appear that the term "creditor as aforesaid," includes "the creditor at whose instance such prisoner shall have been so committed or executed upon for such debt." Therefore it is evident that a debt of an execution creditor is a good petitioning creditor's debt.] The 39th section of the Insolvent Act is consistent with the 74th section of "The Bankruptcy Act, 1849" (a), in which the words are "upon the petition of such prisoner, or upon the petition of *a creditor*," &c. Reading those enactments together their meaning is, that, notwithstanding the vesting of the estate in bankruptcy may issue within a limited time, the instance of a creditor having a good petitioning creditor's debt. The word "creditor" must be construed according to the subject-matter, and when the Legislature is speaking of a fiat, it means a creditor who is legally sufficient to support a fiat. Unless that can be put upon the term, it would include a creditor whose debt was under 50*l*. [*Parke, B.*—The construction is that the petitioning creditor must be a creditor of a debt of 50*l*.]

re Smith for the defendant.—There was a good petitioning creditor's debt. This case is not distinguishable in principle from *Jellis v. Mountford* (b). It is held that the debt of an execution creditor cannot be a petitioning creditor's debt, the 74th section of

& 13 Vict. c. 106.

(b) 4 B. & Ald. 256.

administration of the insolvent's assets from to the Bankrupt Court; and there is no reason why the insolvent should get rid of his obligation to law because an execution creditor petitions, the latter should be in a worse position in that than the other creditors. The discharge under the Act was not a satisfaction of the debt. In *case (a)*, the distinction is pointed out between a discharge by default of the creditor and a discharge by God or act of law. *Foster v. Jackson (b)* is in accordance with the resolutions in *Blumfield's case (a)*. The 21 Jac. 1, c. 24, begins by reciting that the Act is doubtful, and then says, "for the avoiding of doubts and questions hereafter, Be it declared, enacted, &c." The taking of the debtor in custody is not a satisfaction of the debt, but it is the keeping of him in custody until he pays; and therefore if he is discharged to his discharge he cannot have another discharge but it is otherwise if the discharge is *in invitum*. *Cleyton (c)* decided, that, if an execution creditor escapes, the plaintiff may have a new *ca. sa.* for the judgment; and it was there said that the plaintiff having a remedy against the sheriff to take away his remedy against the party who escapes, unless the defendant shews that the plaintiff has

two joint debtors does not operate as a discharge of the other: *Nadin v. Battie* (a). The question whether a judgment creditor who takes his debtor in execution is a good petitioning creditor to support a commission in bankruptcy was raised, but not decided, in *Walker v. Edmondson* (b).

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Cowling replied.

PARKE, B.—The question referred to the Court is, whether, under the circumstances stated, the debt due to the defendant upon the judgment recovered by him, was a good and sufficient petitioning creditor's debt, to support an adjudication of bankruptcy. I am of opinion that it was; and therefore that judgment ought to be entered for the defendant.

It appears that on the 13th of April, 1854, the defendant recovered judgment against the plaintiff for 95*l.* 18*s.* On the 5th of May, 1854, the plaintiff was taken in execution under a *ca. sa.* issued on that judgment and committed to the county gaol; and on the 13th of May, he petitioned the Insolvent Debtors Court for his discharge from custody. On the 26th of June the petition was heard, and the plaintiff discharged. On the 14th of July, and within two months from the time of the vesting order, the defendant filed a petition in bankruptcy against the plaintiff, who was thereupon adjudicated bankrupt. The question is, whether, under these circumstances, there was a good and sufficient petitioning creditor's debt? It cannot be disputed that a petitioning creditor's debt must be not only a legal debt upon which an action might be brought, but also a valid and subsisting debt, both at law and in equity. There is no doubt, that whilst the plaintiff was in custody under the *ca. sa.*, the defendant was incapable of petitioning for a fiat in bankruptcy; because, whilst the

(a) 5 East, 147.

(b) 1 L. M. & P. 772.

because here the now plaintiff, before the bankruptcy, was discharged out of custody under Act, 1 & 2 Vict. c. 110. The question the situation was the defendant, when the plaintiff charged out of custody by virtue of that already observed, that the defendant could not bring an action whilst he held the plaintiff in custody if he had consented to his discharge, because also would the debt have been satisfied. the discharge is *in invitum*. Then what is the effect of such discharge? The Insolvent Act does not deprive a creditor of any collateral remedy which he is entitled to. For instance, if he has a lien, he is not deprived of it; neither is he deprived of his right of distress for arrears: *Phillips v. Shervill* (b). On the same point has been decided, that a discharge under the Act is not a satisfaction of the debt so as to prevent a creditor from enforcing his remedy under the 99th section of the County Court Act, 9 & 10 Vict. c. 95. It was so held by the Court of Common Pleas in *Abley v. Dale* (c), and to a certain extent confirmed by the Court of Exchequer Bench in *In re Christie* (d). All these are perfectly clear. On the other hand it is also clear that a creditor's right of action is put an end to by a discharge. Then, is the effect of a discharge under the Act to deprive the execution creditor of his remedy of suing out a fiat in bankruptcy? I am of opinion it is not. A fiat in bankruptcy is a totally different thing from a fiat in execution.

from that of bringing an action and taking the debtor's goods or body in execution on a judgment; and, in my opinion, it was never meant to be affected by the debtor's discharge under the Insolvent Act. The point was decided under 55 Geo. 3, c. 102, which does not materially differ from the present Act, in the case of *Jellis v. Mountford* (a), where it was held that the effect of the insolvent's discharge was to deprive a creditor of his remedy by action, but not of his right to take out a commission of bankruptcy. That would be a sufficient authority to bind us, if we entertained any doubt upon the subject, but I think that decision is quite correct. Then with respect to the 1 & 2 Vict. c. 110, there is not a word in it which prevents an execution creditor from suing out a fiat in bankruptcy. The 39th section declares that a petition under that Act shall be an act of bankruptcy, and it provides that a fiat may issue within a certain period upon the petition of the insolvent "or of any such creditor as aforesaid," which means "any creditor." There is a similar clause in the 12 & 13 Vict. c. 106 (b), enabling an insolvent debtor to be made bankrupt either upon his own petition "or the petition of a creditor," that is, of any creditor, whether mentioned in the schedule or not. It would be strange if an execution creditor was deprived of the remedy given to other creditors, and I am satisfied that the Legislature had no such intention, but, on the contrary, meant to provide that every creditor should have full right to petition for adjudication in bankruptcy. Both on principle, and on the authority of *Jellis v. Mountford*, I think that our answer ought to be in favour of the defendant, that is to say, that his debt was a good and sufficient petitioning creditor's debt.

ALDERSON, B.—I am of the same opinion. I should

(a) 4 B. & Ald. 256.

(b) Sect. 74.

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consider that we were bound by the decision of the Court of Queen's Bench in *Jellis v. Mountford*, even if I did not agree with it ; but I do.

PLATT, B.—The 39th section of the 1 & 2 Vict. c. 110, which enables *any* creditor to issue a fiat in bankruptcy, in effect, decides this case. I think, however, that even as the law stood before that Act, there would have been, in this case, a good petitioning creditor's debt. In *Cohen v. Cunningham* (a), the debtor was in execution at the suit of the judgment creditor, and therefore it was not competent for him to sue out a commission in bankruptcy, for whilst he held the debtor in prison there was a quasi satisfaction of the debt. So, if a creditor consents to the discharge of his debtor, the debt is satisfied. But it is very different where the debtor is discharged by the act of law and against the will of the creditor. It would be most unjust to hold that the debt was satisfied when the creditor has been prevented from carrying out the execution to its full extent, and by that means obtaining a real satisfaction of his debt. Here the discharge was *in invitum*; then how can it be said that the debt was satisfied? I consider that, at common law, the debt was not satisfied by the debtor being liberated against the consent of the creditor. We need not, however, decide this case on that ground. From the principle of the decision in *Jellis v. Mountford*, and the language of the Insolvent Act, it is perfectly clear that an execution creditor is in the same position in this respect as any other creditor.

MARTIN, B.—I agree, that in this case there was a good petitioning creditor's debt ; but I prefer founding my judgment upon the Act of Parliament alone. We yesterday decided in the case of *Hope v. Meek* (b), that a peti-

(a) 8 T. R. 123.

(b) Post, p. 829.

ing creditor's debt, in order to support a fiat in bankruptcy, must be a present existing debt, and one for which an action might be maintained. But even were that so, I think, upon the construction of the Act, that the Legislature intended that any of the creditors of a debtor, who filed a petition in the Insolvent Debtors Act, should have the option of having his property administered under the Insolvent Act or the Bankrupt Act. It seems to me impossible to read the 39th section of the 22 Vict. c. 110, without seeing that such was the real intention of the Legislature. What may be the real effect, as regards creditors, of a discharge under the Insolvent Act, it is difficult to say; but it is clear that a mortgage remains good, and the case of *Phillips v. Ervill* (a) shews that a creditor is not deprived of his remedy by distress. But supposing the discharge operates so far as the statute points out, and no further; then the 39th section says that the filing of a petition by a debtor in custody who shall be subject to the bankruptcy shall be an act of bankruptcy, and that a fiat in bankruptcy issued within a certain time, whether upon the petition of the prisoner "or the petition of *any such creditor as aforesaid*," &c. Now if the preceding section be read to, it will be seen that not only is the detaining debtor mentioned, but he is principally mentioned as the person who is considered to have the greatest interest in the matter, and to whom notice is required to be given of the prisoner's application to be discharged out of custody and to find sureties. Therefore, so far from the execution debtor not being able to petition in bankruptcy, he is particularly mentioned in the Act as capable of doing so. It seems to me that the true ground for our decision in this case, that a parliamentary power is given to the detaining debtor and the other creditors to elect whether they will

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(a) 6 Q. B. 944.

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have the property of the insolvent administered by means of the insolvent law or the bankrupt law ; and in the latter case the 39th section goes on to say that the fiat shall divest the estate and effects of the insolvent out of the provisional assignee. Moreover I think, that, notwithstanding a debtor is in actual custody, a fiat in bankruptcy may issue against him on the petition of the detaining creditor, not indeed by the common law, but by the words of the Act of Parliament.

Judgment for the defendants^(a).

(a) As to the effect of a discharge under the Insolvent Act, see *Francis v. Dodsworth*, 4 U. B. 202.

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THE LONDON AND SOUTH WESTERN RAILWAY COMPANY. Feb. 13.

RATION—That the defendants, before and at the delivery of the goods and chattels to them committing of the grievances hereinafter mentioned, owners and proprietors of a railway from a certain railway station, called the Waterloo Station, in the county of Surrey, to (amongst other places) a railway terminus of the defendants at Southampton, in

A declaration stated, that the defendants were proprietors of a railway from W. to S., and were common carriers of passengers and their luggage on the said

between the places aforesaid, for reward to them in that behalf: that the plain-passenger, to be by the defendants safely and securely carried, together with on a journey from W. to S., for reward then paid by the plaintiff to the defendants and the defendants received the plaintiff as such passenger, together with to wit, a portmanteau, containing (amongst other things) copies of abstracts of titles, and leases, to be safely and securely carried and conveyed by the defendants carriers from W. to S.; and there, on the arrival of the plaintiff at S., to be the plaintiff. Breach:—That although the defendants, as such carriers, received the plaintiff, and conveyed him to S., yet the defendants did not use proper care in and about the carriage of the plaintiff's luggage, but wholly neglected it so negligently conducted themselves, that, through the carelessness, negligence, and default of the defendants, the luggage of the plaintiff was not safely and securely carried, and delivered by the defendants to the plaintiff at S.; but, on the contrary, through the carelessness, negligence, and default of the defendants, a part of to wit, the portmanteau and the goods contained therein, were for a long space of time deprived of the use, enjoyment, and possession of the plaintiff, and the plaintiff was deprived of the use, enjoyment, and possession of the same during the time aforesaid. Plea:—As to so much of the declaration as said copies of abstracts of title, conveyances, and leases, that the same were and writings contained in one package, and exceeding in value the sum of 10*l*., the same was delivered by the plaintiff to the defendants, as common carriers by land, and that a notice was affixed in the office, that the defendants required an increase of charge to be paid for the conveyance of title deeds and writings; and that, on the delivery of the package, the value and nature thereof were not declared to the plaintiff, nor the increased charge paid. New assignment:—That the plaintiff sues for loss of or injury to the said copies of abstracts of title, conveyances, and leases, meaning of the 11 Geo. 4 & 1 Will. 4, c. 68, but for that the defendants did not use proper care in and about the carriage and conveyance of the same from W. to S., negligently conducted themselves that they were not delivered to the plaintiff on the contrary thereof, the said copies of abstracts of title, conveyances, and leases, for a long time, to wit, from the 3rd of June to the 22nd of September, delayed, and detained by the defendants; and the plaintiff was deprived of the use, enjoyment, and possession of the same, although they were not lost or injured within the meaning of the statute. On demurrer to the new assignment:—*Held*, that the loss or injury to the said copies of abstracts of title, conveyances, and leases, which a carrier is protected by the 11 Geo. 4 & 1 Will. 4, c. 68, is a loss by the articles committed to him, or injury to them whilst in his care, and not a loss by the owner in consequence of the non-delivery of the article in due time or the loss of the use of the article by him; and that, as the plea did not allege that the loss or injury was caused by the negligence of the defendants, the plea was bad, and the plaintiff was entitled to judgment. Whether the new assignment was good.

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the county of Southampton; and the defendants were, during all the time aforesaid, common carriers of passengers and their luggage in, upon, and along the said railway, and between the places aforesaid, by certain carriages of the defendants, for hire and reward to defendants in that behalf; and whilst the defendants were such owners and proprietors of the said railway and such common carriers as aforesaid, heretofore and before the commencement of this suit, to wit, on the 3rd of June, 1854, the plaintiff, at the request of the defendants, became and was a passenger in one of the defendants' said carriages on the said railway, to be by the defendants safely and securely carried and conveyed thereby, together with his luggage, on a certain journey, to wit, from the Waterloo station aforesaid to the station or terminus at Southampton aforesaid, for certain reward then paid by the plaintiff to the defendants in that behalf; and the defendants then received the plaintiff as such passenger, together with his luggage, to wit, a certain portmanteau of the plaintiff's containing divers goods, to wit, &c., (enumerating certain articles of wearing apparel), and certain papers, to wit, twenty copies of abstracts of title to various and certain estates and premises, twenty copies of conveyances and leases to various properties, estates, and premises, &c., the goods and chattels of the plaintiff, of great value, &c., to be safely and securely carried and conveyed by the defendants, as such carriers as aforesaid, from the Waterloo station aforesaid to the said station

aforesaid, and that the plaintiff's luggage should be delivered to the plaintiff as aforesaid. Breach—That although the defendants, as such carriers as aforesaid, then had and received the said luggage of the plaintiff for the purpose aforesaid, and although the defendants conveyed the plaintiff to, and the plaintiff arrived at, the station or terminus at Southampton aforesaid, to wit, on the 3rd of June aforesaid; yet the defendants, not regarding their duty in that behalf, did not use due and proper care in and about the carriage and conveyance of the plaintiff's said luggage by and upon the said railway from the Waterloo station aforesaid to the station or terminus at Southampton aforesaid, but wholly neglected so to do, and then so negligently conducted themselves with respect to the said luggage of the plaintiff upon the said occasion, that by and through the carelessness, negligence, and default of the defendants in the premises the said luggage of the plaintiff was not safely and securely carried, conveyed to, and delivered by the defendants to the plaintiff at Southampton aforesaid, at the station or terminus at Southampton aforesaid, according to the duty of the defendants in that behalf, but on the contrary, by and through the carelessness, negligence, and default of the defendants, a part of the said luggage, to wit, the said portmanteau, and the goods contained therein, were for a long space of time, to wit, from the 3rd of June aforesaid to the 2nd of September then next ensuing, wholly lost to the plaintiff, and the plaintiff was deprived of the use, enjoyment, and possession of the same for and during the time aforesaid.—(The declaration then alleged, that, by reason of the delay in the delivery of the portmanteau, &c., the plaintiff incurred expense in replacing the papers, &c., and suffered inconvenience and loss in carrying on his business).

Plea—As to so much of the said count as relates to the said copies of abstracts of title, copies of conveyances and leases, the defendants say that the same were title

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deeds and writings contained in one package or parcel, and exceeded in value the sum of 10*l.*, which said package or parcel was delivered by the plaintiff to the defendants, as common carriers by land to the place in the declaration mentioned, at a certain office or receiving house of the defendants for the receipt of goods to be carried by them as such common carriers. That, before and at the time when the said goods and chattels of the plaintiff were so delivered at the said office, the defendants had caused to be affixed, and there was then affixed, in legible characters, in a public and conspicuous part of the said office, a notice whereby the defendants notified that a certain increased rate of charge, therein mentioned, was required to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of (amongst other things) title deeds and writings. That, at the time of the delivery of the said package or parcel to the defendants as aforesaid, the value and nature thereof were not declared by the plaintiff, being the person delivering the same, and neither the said increased charge nor any engagement to pay the same was accepted by the person receiving the same at the said Waterloo station.

New assignment—That, as to so much of the declaration as relates to the said copies of abstracts of title, copies of conveyances and leases, and to which the said plea is pleaded, the plaintiff sues not for the supposed causes of

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thereof," and upon which statute the said plea of the defendants is founded; but for that the defendants did not use due and proper care in and about the carriage and conveyance of the said copies of abstracts of title, copies of conveyances, and leases, by and upon the said railway from the Waterloo station aforesaid to the station or terminus at Southampton, but neglected so to do; and so negligently conducted themselves in that behalf upon the said occasion, that, by and through the carelessness, negligence, and default of the defendants in that behalf, the said copies of abstracts of title, copies of conveyances, and leases, were not, nor were any of them or any part thereof, safely and securely carried and conveyed and delivered by the defendants to the plaintiff at Southampton aforesaid, at the station or terminus at Southampton aforesaid, according to the duty of the defendants in that behalf, but on the contrary, by and through the carelessness, negligence, and default of the defendants, the said copies of abstracts of title, copies of conveyances, and leases were for a long space of time, to wit, from the said 3rd of June to the 22nd of September then next ensuing, delayed, kept, and detained by the defendants, and the plaintiff was deprived of the use, enjoyment, and possession of the same for and during the time aforesaid, although the same were not lost or injured within the meaning of the said statute, but were afterwards, and long after a reasonable time for carrying, conveying, and delivering the same as aforesaid had elapsed, and before this suit, delivered by the defendants to the plaintiff; and by reason of which delay of the defendants so newly assigned the plaintiff was put to and incurred the said expenses in the declaration in that behalf mentioned, and suffered the said inconvenience, loss, and injury, &c.

Demurrer and joinder.

Bovill appeared to argue in support of the demurrer (February 9); but the Court called on

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Willes for the plaintiff.—The plea is bad, and if not, the new assignment is good. The contract alleged is, to carry the plaintiff and his luggage from London to Southampton, and there to deliver his luggage to the plaintiff; and the complaint is, that, through the carelessness and negligence of the defendants, a part of the luggage was for a long time *lost to the plaintiff*. The gist of the action is not a *loss* of the goods *by the defendants*, but a neglect to deliver them within a reasonable time: *Raphael v. Pickford* (a). A temporary loss is not within the meaning of the 11 Geo. 4 & 1 Will. 4, c. 68. The object of that enactment was to protect carriers when unable to deliver goods by reason of their loss, and not to afford them protection when, having the goods, they negligently omitted to deliver them. If the statute extends to this case, it would apply to every case where goods are through carelessness left at a terminus instead of being forwarded to their place of destination. The statute was passed with reference to notices by carriers limiting their responsibility; but before that Act it was not usual for them to give notice that they would not be liable for negligence in not forwarding goods within a reasonable time. The plea

carrier from responsibility, even where the loss is occasioned by the gross negligence of his servants: *Hinton v. Dibbin* (a). Where the goods are of the description mentioned in the Act, the carrier is not responsible for any loss whatever, unless their value is declared, and the increased charge paid. [*Martin*, B.—Suppose a person delivered to a porter at a railway station a casket of jewels, and in consequence of his refusal to forward it the casket remained for some time at the station, would that be a loss within the Act?] The intention of the Legislature was to protect carriers against loss, whether permanent or arising from non-delivery either negligent or wilful. [*Parke*, B.—A carrier is not bound to carry everything which is delivered to him, but only to carry according to his public profession. If he says that he will not carry jewels or money unless an extra price is paid for the carriage of them, then he is not bound to carry them unless the extra price be paid; but if he says that he will carry them, but will not be responsible for their loss, then he is bound to carry them, though he is not liable in case of their loss. This subject was fully explained in *Johnson v. The Midland Railway Company* (b). Here the question is, what is the meaning of the word “loss” in the 11 Geo. 4 & 1 Will. 4, c. 68?] It means any loss for which an action may be maintained. [*Alderson*, B.—Suppose the goods were known by the carrier to exist, but were not delivered by him for a month, would that be a loss within the Act?] The goods during that time would be *lost to the owner*, and the carrier would be protected by the Act. The mere fact of goods being found cannot create a responsibility when none would have existed if the goods had been permanently lost. The only exception in the statute is loss arising from the felonious acts of servants. The declaration charges a loss within the

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(a) 2 Q. B. 646.

(b) 4 Exch. 367.

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meaning of the statute, and that is answered by the plea. The new assignment is in substance the same as the declaration, and consequently in no respect alters the effect of the plea.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. (After stating the pleadings)—The question in this case turns entirely upon the meaning of the notice given by the defendants, pursuant to the statute 11 Geo. 4 & 1 Will. 4, c. 68, s. 1, protecting them from liability for loss of writings and title deeds, unless an increased rate of carriage was paid.

If the statute, in such case of non-payment, means to protect the carrier from all liability to pay to the owner of the title deeds, or other enumerated articles, for *any loss* of any description whatever, occasioned *to him* by the non-delivery or by the delay of the delivery of those articles, by the neglect of the carriers or their servants, then the defendants are exempt; for the plea is sufficient, and the new assignment discloses no case to which the notice does not extend.

On the other hand, if the term "loss" in the statute means *loss* of the parcel *by the carrier*, such as by the abstraction by a stranger or by his own servants, not amounting to a felonious act, or by the carrier or his servants losing them from vehicles in the course of carriage, or by mislaying them, so that it was not known where to find them when they ought to be delivered, or other cases not very easy to define, which fall under the description of a *loss by the carriers*, then the plaintiff has a right to recover, for the plea does not disclose any such case, and the declaration certainly does not; and the plaintiff may have judgment for the badness of the plea, without reference to the question whether the new assignment be good or not.

What, then, does the statute mean by the word "loss" in the enacting part of the 1st section? The term "loss" is used in the preamble in a different sense from both those suggested,—where it is said, that, by the frequent omissions of the senders of parcels to notify the value and nature of the contents, so as to enable carriers to protect themselves against *losses* arising from their legal responsibility, they have been exposed to great risks, and sustained heavy *losses*;—it is meant that they have not been able to protect themselves, and been subject to losses of their *own monies* by way of compensation to the owner of the goods. The use of the word "loss," therefore, in the preamble, throws no light upon the question in this case.

The statute then proceeds to enact, that no carrier shall be liable for the *loss of, or any injury to*, any of the enumerated articles. This does not mean the loss of the monies of the carrier, but the *loss of the article* itself, or injury to it.

In ordinary parlance, this appears to mean, the loss by *the carrier* of the articles committed to him *or injury* to them whilst in his care, not the loss sustained by the owner by non-delivery of the article in due time or altogether, or the loss of the use of the article by him. By the term "the injury" is clearly meant the injury to the article itself. Then, although the use of the term "loss" in the preamble does not aid in the construction of the enactment, the recital of its cause does,—it recites that valuable property, consisting of articles of great value in small compass, was liable to depredations,—and the reason of the law must be considered as being to protect the carrier, not in *all cases* where the owner of the articles sustained a damage from the neglect of the carrier to carry, but in cases of a similar nature to those recited, where the chattel was either abstracted altogether or taken from the place where it ought to be, and incapable of being delivered at the time it ought to be by reason of that sort of loss.

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We think that this is the true construction of the clause, and the carrier is exempted only from being responsible for a loss *by him* of the particular articles named. If there should be such a loss, no question arises in this case whether it must be temporary or permanent; for the plea alleges no such loss: and therefore there must be judgment for the plaintiff for the insufficiency of the plea.

Judgment for the plaintiff

Feb. 9.

BAINES and Others v. HOLLAND.

Declaration on a policy of insurance, whereby a ship was insured "at and from New York to Quebec, during her stay there, thence to the United Kingdom, &c."

THE declaration stated, that the plaintiffs, by J. Jaffray & Co., their agents in that behalf, caused to be made a policy of insurance, purporting thereby, and containing therein, that J. Jaffray & Co., as well in their own name as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all, did make assurance and cause

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&c., of and in the good ship or vessel the "Lady Bulwer," whosoever should go for master in the said ship, beginning the adventure upon the goods and merchandizes from the loading thereof aboard the ship at, as above, upon the ship &c., and so should continue and endure during her abode there, upon the ship &c.; and further, until the ship with all her ordnance, tackle, apparel, &c., and goods and merchandizes whatsoever, should be arrived at, as above; upon the ship, &c., until she had there moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until the same should be there discharged and safely landed. (The policy then stated that the ship &c., and goods and merchandize, &c., were valued at 3350*l.* on ship, valued 8000*l.*) Touching the adventures and perils which they the assurers were content to bear, and did take upon them in that voyage, they were of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisal, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said goods and merchandizes, and ship, &c., or any part thereof, &c. And so they the assurers were contented, and did thereby promise and bind themselves, each for his own part, their heirs, &c., to the assured, their executors, &c., for the true performance of the premises, confessing themselves paid the consideration due unto them for that assurance by the assured, at and after the rate of 7*l.* 7*s.* per cent., *the said ship being warranted to sail from Quebec on or before the 1st of November, 1853.* And by a certain memorandum there under-written, corn, fish, salt, fruit, flour, and seed were warranted free from average, unless general or the ship should be stranded, &c.; one-half per cent. of the premiums to be returned if the ship should sail from Quebec on or before the 20th of

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October in the year aforesaid; and one per cent. of the premiums to be returned, if the ship should sail from Quebec on or before the 10th of October in the year aforesaid; and two per cent. of the premiums to be returned if the ship should sail from Quebec on or before the 1st of October in the same year.—(The declaration then alleged the payment by the plaintiffs of the premium, the subscription of the policy by the defendants, and the interest of the plaintiffs.)—Averments.—That, on the 15th of October, 1853, the ship departed and set sail from New York on her voyage to the United Kingdom by way of Quebec; and that afterwards, and whilst the ship was proceeding on her said voyage, and before her arrival at Quebec, the ship with the goods on board thereof, by reason of the perils of the sea insured against, and not by reason of capture or seizure or of the consequences, or of any consequence or any attempt thereof, struck on certain rocks, and became and was totally lost. Breach.—Non-payment of the sum insured.

Plea.—That, during the whole of the 1st day of November, 1853, in the policy mentioned, the vessel was at sea safely proceeding upon the part of the voyage in the

of time between the day when she so sailed on her voyage to Quebec and the 1st of November was not, at that season of the year, reasonably sufficient in length to enable the vessel to comply with the warranty of sailing from Quebec on or before the 1st of November, 1853.

Demurrer and joinder.

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Willes, in support of the demurrer.—The question turns on the meaning of the words “the said ship being warranted to sail from Quebec on or before the 1st of November, 1853.” The warranty must be read with some qualification, otherwise there would be no insurance between New York and Quebec. Therefore, the words must be restrained, in accordance with the maxim “*verba generalia restringuntur ad habilitatem rei vel personæ*”(a). The warranty applies only to the voyage between Quebec and the United Kingdom. Its meaning is, that, with respect to that part of the voyage, the underwriters are not to be liable unless the vessel sails from Quebec by the 1st of November, 1853. It is not a warranty to arrive at, but only to sail from, Quebec by that time. If there had been no warranty, the vessel must have sailed within a reasonable time. Suppose the wind was such that the vessel, if not lost, would have arrived at Quebec in time to sail from thence on the 1st of November, 1853, would not the underwriters have been liable? But the plea only says, that at that season of the year the time was not reasonably sufficient to enable the vessel to comply with the warranty.

Bramwell contra.—It is conceded, that the warranty cannot receive a literal construction, for in that case the policy would not attach if the vessel was lost the day after she sailed from New York, though there was ample time for her to arrive at Quebec before the 1st of November, 1853. The true meaning of the warranty is, that the vessel shall sail

(a) Bac. Max. Reg. 10

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from New York on her voyage to Quebec so as to be enabled to leave Quebec on or before the 1st of November, 1853. If the policy had been only "at and from Quebec to the United Kingdom," and the ship had been burnt at Quebec on the 2nd of November, 1853, it is clear that the underwriters would not have been liable; then why should they be so now? There is the same warranty to sail from Quebec, only it is coupled with an insurance during the previous voyage from New York to Quebec. A different construction would lead to this anomaly, that, if the vessel arrived at Quebec before the 1st of November, 1853, and did not sail from thence until after that day, the underwriters would not be liable; yet if the vessel was lost on the 2nd of November, 1853, while on the voyage to Quebec, the underwriters would be liable. [*Parke, B.*—All difficulty is put an end to by reading the policy as an insurance from New York to Quebec and from Quebec to the United Kingdom, with a warranty to sail from Quebec on the 1st of November, 1853, if not lost before that time. It is evident that the parties meant that the ship should be within the protection of the policy before her arrival at Quebec.] The intention was, that, after the 1st of November, 1853,

day. [*Parke, B.*—To render the underwriters liable on the voyage from Quebec to the United Kingdom, the vessel must sail from Quebec by the 1st of November. They must have meant to warrant the safe arrival of the vessel at Quebec; and that intention cannot be carried into effect by a literal construction of the policy, because that would make the assured undertake that the vessel should arrive at Quebec on that day.] According to the other construction, if the vessel was lost at Quebec on the 2nd of November, the underwriters would not be liable; yet if the loss took place on that day, whilst the vessel was on the voyage to Quebec, they would be liable. This is in effect but one voyage.—He referred to *Hore v. Whitmore* (a).

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Willes was not called upon to reply.

PARKE, B.—I am of opinion that the plaintiffs are entitled to judgment. The question turns entirely on the following words in the policy, “the said ship being warranted to sail from Quebec on or before the 1st of November, 1853.” Those words cannot be understood in their literal sense, because they would then amount to a warranty that the vessel should arrive at Quebec and sail from thence on or before the 1st of November, 1853; so that in the case of the vessel being lost on the intermediate voyage from New York to Quebec the underwriters would not be liable. That could never have been the intention of the parties, and therefore that construction must be rejected. The question then is, what construction ought to be adopted. It seems to me that the natural construction is, that this is a warranty to sail from Quebec on or before the 1st of November, 1853, if the vessel arrives there by that time. Unless the words of the warranty be so qualified, there would be no insurance whatever between New York and Quebec. If this is to be read as a warranty to

(a) Cowp. 784.

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sail from New York in such time as to arrive at Quebec by the 1st of November, 1853, or if, as suggested by Mr. *Bramwell*, it should be read as a time policy between New York and Quebec (which description of policy is common in America), great violence would be done to the language; and if the vessel arrived at Quebec after the day fixed, the underwriters would cease to be responsible. The most natural construction is, that, so far as relates to the voyage from New York to Quebec, the policy is altogether without limitation as to time; but, as regards the voyage from Quebec to the United Kingdom, the underwriters are not responsible unless the vessel sails from Quebec on or before the 1st of November, 1853. The defendant may have liberty to amend, otherwise there must be judgment for the plaintiffs.

ALDERSON, B.—I am of the same opinion.

PLATT, B.—I am of the same opinion. The policy provides for the contingency of the vessel sailing from Quebec either on the 20th, the 10th, or the 1st of October; and as an inducement to do so, in either of those cases a certain portion of the premium is to be returned. Then by the warranty, the vessel is at all events to sail from Quebec on the 1st of November. That shews that the warranty has reference solely to the voyage from Quebec to the United Kingdom. The words "to sail from Quebec" import a commencement of the voyage. The most reasonable construction of the policy is, that, as to the voyage from New York to Quebec, there is no limitation as to time; but that, with respect to the other part of the voyage, its commencement before the 1st of November, 1853, is a condition precedent to the attaching of the risk.

MARTIN, B., concurred.

The defendant to amend, otherwise

Judgment for the plaintiffs.

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CUTHBERT v. CUMMING.

Feb. 8.

THE declaration stated that the plaintiff and defendant agreed by charterparty, that the plaintiff's ship or vessel, called the "Agnes," should with all convenient speed be made ready, and receive and take on board at Liverpool from the defendant or his agents such a cargo of legal goods as should be tendered for shipment, and proceed therewith either to Barbadoes or Trinidad, at the defendant's option, to be declared when the vessel went into a loading berth, and there deliver the same agreeably to bills of lading, free of freight; which being done, the said ship or vessel should again be made ready, and at the port of discharge of the outward cargo, at the usual shipping places, should receive and take on board from the Defendant or his agents a full and complete cargo of sugar, molasses, and other lawful produce, not exceeding what the vessel could conveniently stow and carry over and above her cabin, and sufficient room for the cables, stores, water, and crew; and being so laden and dispatched, should therewith proceed with all possible dispatch to Liverpool or the Clyde direct, as ordered on signing bills of lading, and there make a true delivery thereof, according to bills of lading, and so end the said intended voyage (the act of God, adverse winds, &c., excepted), the defendant being allowed fifteen days for loading at Liverpool, and forty running days (Sundays excepted) for discharging and loading abroad; the cargo at port of discharge on return to be discharged as quickly as the custom of the port would permit, and the cargo to be laden and discharged in the usual and customary manner, the vessel rendering all practicable assistance by means of her crew and boats. In consideration whereof, the defendant did thereby promise and agree to cause to be laden on board the said ship, at her port of discharge abroad, such

By charterparty, the defendant agreed to load on board a vessel at Trinidad "a full and complete cargo of sugar, molasses, and other produce."—*Held*, first, that evidence was admissible of a custom at Trinidad to load sugar in hogsheads, and molasses in puncheons; and therefore that a full and complete cargo of sugar and molasses so packed was a compliance with the contract; secondly, that the custom was reasonable and good in law.

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full and complete cargo as aforesaid in the manner therein mentioned for that purpose, and to pay or cause to be paid for freight for the use and hire of the said vessel in respect of the said voyage out and home, if ordered to discharge and load in Trinidad, after the rate of for sugar ^{and}/_{or} molasses 4*l.* 15*s.* sterling per ton of twenty hundred weight net delivered; cocoa in bags, limited to ten tons, 4*l.* 15*s.* per ton, of twenty hundred weight, net, delivered; and if any other produce were shipped, to pay in full proportion to sugar ^{and}/_{or} molasses, all in full payment, &c. (The charterparty then provided for the mode of payment.) That the master might sign bills of lading as tendered without prejudice to the charterparty.—Averments:—That the defendant duly declared his option that the vessel should proceed with her outward cargo to Trinidad, and that, on signing bills of lading at the port of loading abroad, the said vessel was ordered to proceed to Liverpool; that the plaintiff did all things necessary on his part, to entitle him to have the agreed cargo loaded on board the said vessel at Trinidad, and that the time for so doing had elapsed.—Breach: that the defendant made default in loading the agreed cargo.

Plea—That the defendant did load the agreed cargo, according to the said agreement. Issue thereon.

At the trial, before *Martin*, B., at the London Sittings in last Michaelmas Term, the plaintiff proved that the ship proceeded to Trinidad, and there delivered her outward cargo, and received on board from the defendant's agents there 170 hogsheads, 32 tierces, and 108 barrels of sugar, 195 puncheons of molasses, 4 tons 15 cwt. of cocoa, and a quantity of cattle-horns. This cargo did not fill the ship, there being (besides smaller spaces) a vacant space in the hold from stem to stern of about three feet in depth, in which a tier of barrels of sugar, and upon that a tier of bags of cocoa, might have been placed. The quantity of goods which might have been placed in such vacant spaces in the

hold would have weighed about twenty-nine tons. The master required that more cargo should be shipped in barrels of sugar and bags of cocoa, and offered to take on freight, at a lower rate than that stipulated in the charterparty, any quantity of barrels of sugar. The defendant's agents refused to ship any more cargo, alleging, that, under the terms of the charterparty, the defendant was only bound to ship as much sugar in hogsheads and molasses in puncheons as the ship could carry, and that the ship could not carry more hogsheads or puncheons. In fact, the ship had on board as many hogsheads of sugar and puncheons of molasses as she could carry, the vacant spaces in the hold not being deep enough to receive packages of that size. And it was proved that sugar was occasionally packed in barrels and tierces for exportation, and that such barrels and tierces might have been packed in the vacant space in the ship. The plaintiff claimed to recover dead freight in respect of the vacant spaces in the hold. On the part of the defendant, it was alleged that the cargo was a full and complete cargo within the meaning of the charterparty, which was to be governed by the usage or custom and practice of Trinidad; and that, under the contract contained in the charterparty, the charterer was only bound to ship sugar in hogsheads and molasses in puncheons; and that, having shipped as much sugar in hogsheads and molasses in puncheons as the ship could carry, the defendant had fulfilled his contract, and was not bound to supply barrels and tierces or other cargo. The defendant tendered evidence to prove that, by the alleged custom, where a charterparty binds the charterer to find a full and complete cargo of sugar $\frac{\text{and}}{\text{or}}$ molasses at Trinidad, and the charter is silent as to the broken stowage, the invariable obligation on the merchant extends no further than to ship sugar in hogsheads and molasses in puncheons.

It was objected on the part of the plaintiff, first, that evidence of the custom was inadmissible; secondly, that the

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custom was bad in law. The learned Judge admitted the evidence; and, it being agreed that the custom was proved, by his Lordship's direction, a verdict was found for the plaintiff for 139*l.* 8*s.* 3*d.* (the amount of the dead freight at 4*l.* 15*s.* per ton,) and leave was reserved to the defendant to move to enter a nonsuit or verdict for him.

Hugh Hill in the following Term obtained a rule nisi accordingly; against which

Burnie shewed cause (Feb. 7).—First, evidence of the custom was not admissible. By the charterparty, the defendant undertook to load "a full and complete cargo," and the custom contradicts the express terms of the contract. According to the rule laid down by *Abbott*, C.J., in *Hunter v. Fry* (a), the shipowner was bound to take on board, and consequently the freighter to load, such a quantity of goods as the ship was capable of carrying with safety. Here, it was proved that the vessel might have carried a greater quantity of sugar and molasses, if packed in barrels and tierces; and that, even as they were packed, there was room in the ship for other smaller packages.—Secondly, the custom is bad for want of reciprocity. It is conceded that the defendant has the option of loading any kind of goods he thinks fit: *Moorsom v. Page* (b), *Irving v. Clegg* (c); but if this custom prevails, the plaintiff would be bound to accept goods packed in such a manner as to deprive him of a portion of his freight.

Hugh Hill and *J. Henderson* in support of the rule.—The expression "a full and complete cargo" must be interpreted by evidence of the custom at the port of loading. Where a custom prevailed of compressing bales of cotton wool by machinery to improve their stowage, the furnish-

(a) 2 B. & Ald. 421. (b) 4 Camp. 103. (c) 1 Bing. N. C. 53.

ing a cargo of cotton wool in uncompressed bales, as they came from the grower, was held not to be a compliance with a contract to load a full and complete cargo: *Benson v. Schneider* (a). It is not suggested that sugar should be loaded in bulk; and since it must be packed in some way, the only mode of ascertaining whether it is so loaded as to form a full and complete cargo, is by shewing the custom at the port of loading. Such evidence does not contradict, but explains the contract. [*Platt, B.*—The question, how far established usage is admissible to explain, or annex customary incidents to, a contract was considered in *Hutton v. Warren* (b).] The principle there laid down is recognised in *Syers v. Jonas* (c), where it was held that, in an action for the price of goods sold, evidence is admissible to shew that, by the established usage of the tobacco trade, all sales are by sample, although not so expressed in the bought and sold notes. Again, in *Brown v. Byrne* (d), where a bill of lading provided that the goods should be delivered to the order of the consignee or his assigns at Liverpool, "he or they paying freight for the said goods five-eighths of a penny sterling per pound, with primage and average accustomed," it was held that evidence was admissible of a mercantile custom at Liverpool, by which the consignee was entitled to a deduction of three months' discount from the freight. The Court there say, that evidence of this kind neither adds to, nor qualifies, nor contradicts the written contract, but only ascertains it by expounding the language. In 1 Smith's Leading Cases, p. 105, it is said, that "evidence of previous usage between the parties to a contract may be admitted with the same effect, subject, of course, to the same restriction as the general usage of trade." In *Ford v. Yates* (e), the evidence which was sought to be

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(a) 7 Taunt. 272.

(b) 1 M. & W. 468.

(c) 2 Exch. 111.

(d) 3 E. & B. 703.

(e) 2 M. & Gr. 649.

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adduced would have contradicted the terms of the written contract. Further, there is nothing unreasonable in a custom, that goods shall be packed in that mode in which they can be carried most conveniently, and with the smallest loss to the merchant.

Cur. adv. vult.

ALDERSON, B., now said.—This was an action on a charterparty for not loading the vessel properly; and the question was as to the construction of the charterparty, coupled with certain evidence which was received by my Brother *Martin*, who tried the case. The contract on the face of the charterparty was, “to load a full and complete cargo of sugar, molasses, ^{and}_{or} other lawful produce;” so that according to the contract the parties were either to load a full and complete cargo of sugar and molasses and other lawful produce, or a full and complete cargo of sugar and molasses, or a full and complete cargo of other lawful produce—leaving it open in every way by reason of the “and” and “or” being introduced in the charterparty. The facts were, that the defendant put on board the ship, at Trinidad, a cargo of sugar in hogsheads and molasses in puncheons, as

and secondly, if admissible, whether the custom is a reasonable and legal custom.

First, as to whether evidence of the custom should have been received. It is not admissible if it contradicts the charterparty itself. The charterparty is the contract and the only contract between the parties. No evidence can be given to contradict or alter its effect; but then its effect must be clear from the wording of the document itself. There is a perfect right to explain the contract and shew what it really means, according to the words used by the parties. It may be shewn that "a full and complete cargo of sugar and molasses" means, in truth, a full and complete cargo of sugar and molasses packed in the ordinary way in which sugar and molasses are packed to be carried. That was in fact the evidence received. It was not evidence to alter or control the contract, but to shew what the contract really was. We are therefore of opinion that the evidence was properly received. In the course of the argument there was cited a case of *Brown v. Byrne* (a), in which the marginal note states, it was held that the custom *controlled* the bill of lading. If the word "controlled" be taken in its literal sense, we do not agree with the conclusion. If the word means "to alter the effect of that which was clearly expressed" on the bill of lading, we think that evidence of the custom was not admissible for that purpose; but if the word "controlled" was used (as it probably was), in the sense of *explain*, it is perfectly right. It is not necessary to advert to the facts of that case. There may be some little doubt about it; here the evidence was properly receivable.

The question then is, whether the custom is a reasonable and legal custom. It was proved that sugar packed in hogsheads, and molasses packed in puncheons, come more conveniently and of better quality, and with less loss to the merchant in this country. It seems to us by no means un-

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(a) 3 E. & B. 703.

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reasonable that such should be the mode of loading the cargo, and that the parties should have agreed, with reference to this custom, that the cargo should be loaded in the established mode. The custom is a reasonable custom, because it enables the sugar to be carried in a way most advantageous to the merchant, and the other party is not without his remedy. He may stipulate for broken stowage, for the custom only applies to charterparties in which there is no such stipulation. It cannot apply if there be such a stipulation, because then it would contradict the charterparty itself. Where there is no stipulation as to broken stowage, the shipowner knows where he sends his ships for sugar and molasses, what is the nature of the contract, and that the ship will be loaded according to the custom, and he will make his charge accordingly. If, instead of filling up his ship, he is obliged to leave a space unoccupied, he must charge a higher freight. There is no injustice done. For these reasons we think that the rule should be absolute for a nonsuit or to enter a verdict for the defendant.

Rule absolute (a).

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CLEMENTS v. POLLARD.

Jan. 26.

THE declaration stated, that the plaintiff sued the defendant as clerk of the Metropolitan Commissioners of Sewers for damage done to a carriage of the plaintiff by its falling to a hole in the Westminster Bridge Road, in a certain sewer, which at the time of the accident was in the possession and under the control of the Commissioners. The defendant pleaded not guilty by statute, upon which issue was joined.

At the trial, before *Erle*, J., at the last Surrey Assizes, it appeared, that one Hill, a contractor, had entered into a contract with the Metropolitan Commissioners of Sewers for the repair of the sewer where the accident occurred. The defendant was one of the clerks of the Commissioners of that district; but it appeared that another person had acted as their chief clerk until the passing of the 12 & 13 Vict. c. 93, when he was appointed their secretary.

Notice of action had been served on the defendant, pursuant to 11 & 12 Vict. c. 112, s. 127; but, after action brought, notice was given to the plaintiff, that the defendant was not the proper person to be sued. On the part of the defendant it was contended, that the 125th section of the 11 & 12 Vict. c. 112, by which it is enacted, that "the Commissioners may sue and be sued at law and in equity in the name of their clerk for the time being," means the chief clerk or secretary of the Commissioners, which the defendant was not. The learned Judge left the case to the jury, who found a verdict for the plaintiff, with 5*l.* damages; but he reserved leave to the defendant to move to set that verdict aside, and enter a verdict for him.

Chambers obtained a rule nisi accordingly, against which

Under the 11 & 12 Vict. c. 112, which enacts, that the Metropolitan Commissioners of Sewers may sue and be sued "in the name of the clerk for the time being," as explained by the 15th section of the 12 & 13 Vict. c. 93, which enacts, that the chief clerk to the Commissioners shall be called the secretary; and the word "clerk," in any of the Acts relating to the Commissioners, shall include "secretary;" the Commissioners must sue and be sued in the name of their secretary.

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James (Hawkins with him) shewed cause.—The question turns on the construction of the 125th, 126th, 127th, and 138th sections of the 11 & 12 Vict. c. 112. The 125th section enables parties to sue the Commissioners “in the name of their clerk for the time being.” The 126th section made “the clerk,” when plaintiff, a competent witness. The 127th section enacts, that “no writ or process shall be sued out against, or served upon the Commissioners, or *their clerk*, or any clerk, surveyor,” &c., until a notice of action has been given a month before action. And the 138th section enacts, that “any summons or notice, &c., required to be served upon the Commissioners, or any of them, &c., or upon their clerk, may lawfully be served by delivering the same personally to the clerk of the Commissioners, or to some inmate at his usual place of abode.” [*Alderson*, B.—All those sections shew, that *the clerk* is to be sued, which means the principal clerk. *Parke*, B.—The meaning of the words “the clerk” is further explained by the 15th section of the 12 & 13 Vict. c. 93, which enacts, that “after the passing of this Act the chief clerk to the Commissioners shall be called the secretary, and the word ‘clerk’ in the recited Act,” viz. the 11 & 12 Vict. c. 112, “and this Act, and in any other Act relating to the Commissioners, and in any commission issued under the recited Act respectively, shall include ‘secretary.’” Therefore, the secretary should have been made the defendant.]

Chambers and *Bovill*, in support of the rule, were not called upon.

PER CURIAM (a).—The rule must be absolute.

Rule absolute (b).

(a) *Pollock*, C. B., *Parke*, B.,
Alderson, B., and *Martin*, B.

(b) See *Cornwell v. The Commissioners of Sewers*, ante, p. 771.

1855.

HARDING and Wife v. ROBERTS.

Feb. 5.

JECTMENT to recover one-fourth part of a house and
l in the parish of Normanby, in the county of Lincoln.
lea, not guilty, and issue thereon.

t the trial, before *Parke*, B., at the last Lincoln Assizes,
peared that the plaintiffs claimed title under one Mil-
Radish, deceased, the daughter of John West, senior,
had died shortly after having made his will, which
dated the 8th of March, 1802. The will was as fol-
:—"I John West, of &c., devise, give, and bequeath
my dearly beloved wife Ann West, during her natural
the interest or rent of my house with the yard there-
adjoining and belonging, situate and being in the
h of Normanby next Spittle, together with all my
s and effects whatsoever, and after the death of my
wife Ann West, I give and bequeath the said house,
ther with all my other goods and effects whatsoever,
ly unto my son John West and my son Thomas West,
my daughter Mildred Radish, the wife of William
sh, and unto my daughter Ann West, to be equally
led amongst them. All the rest, residue, and remain-
f my money, goods, and chattels I give and bequeath
my said wife Ann West, and I name and constitute
appoint her my said wife Ann West sole executrix of
my last will and testament." The defendant claimed
r the will of John West, the son and heir at law of John
t, the testator; and it was contended, on the defendant's
lf, that the will gave only an estate for life in the pro-
, and that he was entitled to the verdict. The learned
e was of that opinion, and directed a verdict to be
ed for him, but reserved leave to the plaintiffs to move
; it aside and to enter a verdict for them, if the Court

A testator, by
his will, made
in 1802, de-
vised and be-
queathed to
his wife, dur-
ing her nat-
ural life, the
interest or
rent of his
house, with
the yard
thereunto ad-
joining and
belonging,
situate in the
parish of N.,
together with
all his other
goods and ef-
fects what-
soever; and,
after the death
of his wife,
he gave and
bequeathed
the said house,
together with
all his other
goods and ef-
fects what-
soever, jointly,
unto his four
children (one
of whom was
his heir at
law), to be
equally divid-
ed amongst
them. All
the rest, resi-
due, and re-
mainder of
his money,
goods, and
chattels, he
gave and de-
vised to his
said wife:—
Held, that the
children took
an estate for
life only in
the house.

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should be of opinion that the testator's children took an estate in fee under the will.

Mellor having obtained a rule nisi accordingly,

Hayes shewed cause.—If the will gave an estate for life only to the children of the original testator, the remainder went to the heir at law, and the defendant, as claiming under him, is entitled to retain the verdict. Now the will contains no words of limitation whatever to create an estate in fee; and although the estate is to be equally divided amongst the children, no authority can be cited which decides, that the interest in common enlarges the estate into a fee. Upon this point several cases in the defendant's favour are to be found collected in 6 Cruise's Digest, 4 edit., p. 259. In *Doe d. Norris v. Tucker(a)*, a testator being seised in fee of certain premises devised as follows: "I give and bequeath to my wife my freehold estate, called Pouncett's, during her natural life. I give to my son R., my heir, after the death of my wife, 10*l*. Item, all the above bequeathed lands, goods, and chattels, after the death of my wife, I give and devise to my son R., to my son T., to my son B,

old law, it is clear that a devise of messuages, lands, tenements, or hereditaments (not estate), without words of limitation, conferred an estate for life only on the devisee: *Doe d. Bowes v. Blackett* (a). The fact that in this will the heir at law is one of the devisees does not affect the question. In the recent case of *Footner v. Cooper* (b), cited on moving the rule, the Court held, that the general words "all *property* whatever" were sufficient to pass an estate in fee, as there was nothing in the will to restrict the words to the personalty only.

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Mellor in support of the rule.—If it is apparent upon the face of the will that it was the intention of the testator to give a fee to his children, the Court will be astute to put such an interpretation on the words as to carry out that intention. Here the testator uses words disposing of the real property, so connected with the words by which the personal property is given, that the same effect ought to be given to both. In *Roe v. Pattison* (c), the testator, after several bequests of stock in the Four per Cents., devised all the remainder in the above stocks "with my freehold property to M.S.;" and it was held that M. S. took a fee in the real estate. The words, "I give and bequeath all my other goods and effects whatsoever," are sufficient to vest such property absolutely in the children. But these words are connected with the devise of the house by the words "together with." The language of a will must have that interpretation put upon it which is consonant with the intention of the testator: *Doe d. Tofield v. Tofield* (d), *Doe d. Andrew v. Lainchbury* (e). [*Hayes* referred to *Doe d. Sewell v. Parratt* (f), where a testator, having devised certain real estate, by a codicil, after

(a) Cowp. 235; Jarman on Wills, 170.

(b) 23 L. J., Chanc., 229.

(c) 16 East, 221.

(d) 11 East, 246.

(e) Id. 290.

(f) 3 B. & Ad. 469.

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bequeathing a certain sum of money to A. B., devised as follows: "I also bequeath to him my chambers in Albany, for which I paid 600 guineas, with all my furniture, except such articles as I may particularly except from this donation." It appeared that the testator was seised of these chambers, for which he had given the sum mentioned in the codicil, and it was held, that under the codicil the devisee took an estate for life only.] [*Parke, B.*—The plaintiffs must contend that a gift by will of a house and the furniture it contains, by which the furniture passes absolutely, gives an estate in fee in the house.] The plaintiffs contend that where both the personalty and realty are tied together, as they are in this will, and there is a gift out and out of the personalty, the realty passes also. In *Doe d. Booley v. Roberts (a)*, a testator's will was as follows:—"I give and bequeath to Mary, my wife, all my lands, messuages, and tenements, by her freely to be possessed and enjoyed, with all my property whatsoever." No mention was made of personalty in the will, nor did it appear that the testator had any. The Court held, that the wife took a fee in the realty. Lord *Denman, C. J.*, in delivering the judgment of the Court, after stating that it did not appear that the testator had any personalty, says, "But he plainly thought that he might die possessed of personalty, and, in case he should, meant to give it exactly in the same manner and for the same interest as the land and houses. This appears to the Court a full indication that he gave both in perpetuity, and a decision to this effect leaves all the cases untouched."

PARKE, B.—I have no doubt in saying that the will does not contain any words sufficient to pass the fee in the property in dispute. It is impossible to come to any other conclusion, unless it can be said that giving a ready-

(a) 11 A. & E. 1000.

furnished house conveys the fee. But the case of *Doe d. Sewell v. Parratt* decides that similar words used with reference to a furnished house do not pass the fee, and this case is not distinguishable from that. I therefore am of opinion that the rule must be discharged.

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ALDERSON, B.—I am of the same opinion. The circumstance that one of the devisees is the heir at law may, no doubt, be used to shew what was the intention of the testator, but that cannot give the words the effect of passing the fee, when they can bear no such construction.

PLATT, B., and MARTIN, B., concurred.

Rule discharged.

1855.

Feb. 6.

PROCTOR v. HODGSON (a).

A right of way of necessity can only arise by grant, express or implied.

Where, to an action of trespass qu. cl. fr., the defendant pleaded, that one N. S., until and at the time of his death, was seised as well of the said close in which, &c., holden by him of the manor of H., as also of another adjoining close, called Y., holden of the manor of T., and that the said N. S. had no way to close Y., except over the said close in which, &c.; and that on his death the said closes respectively escheated to the lords of the manors of H. and T., and

TRESPASS for breaking and entering a certain close of the plaintiff's, called Far Close Field, situate in the parish of Melling, in the county of Lancaster.

In addition to other pleas, the defendant pleaded, fourthly, that one Newman Swainson in his lifetime and until and at the time of his death was seised in fee as well of the said close in which, &c., and which said close was holden by him as of the manor of Hornby, as also of a certain other close, called Long Yarlside, and which said last-mentioned close was holden by him as of a certain other manor, to wit, of the manor of Tunstal; and that the said close in which, &c., lay and still lies contiguous to a certain common highway; and that the said close, called the Long Yarlside, was situate and next adjoining to the said close in which, &c., and that the said N. Swainson being so seised, had no way to the said close called Long Yarlside, excepting from the said highway, through and over the said close in which, &c.; that the said N. Swainson died so seised of the said several closes without having devised the same or either of them, and without heirs, whereupon the said close in which, &c., escheated to the then lord of the manor of Hornby, and the said other close escheated to the then lord of the manor of Tunstal; and the defendant says, that

that the lord of T., by virtue of the premises, from and after the death of the said N. S. until and at the time when, &c. necessarily had and still of right ought to have a certain necessary way on foot, &c. over the said close, &c., to and from the said close called Y., at all times of the year, for the necessary use and occupation of the said close called Y., the same being such way as had been and was used in the lifetime, and until and at the time of the death of the said N. S., and the most convenient way over the said close, in which, &c., to the said other close. The plea then justified the trespasses as the servant of the lord of the manor of T.:—*Held*, on motion for judgment non obstante veredicto, that the plea was bad.

Held, also, that, assuming title by escheat to be equivalent to title by grant, the plea was bad in not averring that the lord of the manor of T. had no other way at the time of the trespass.

(a) I have been favoured with this report by Mr. J. E. Davis.—J. G.

the said lord of the manor of Tunstal, by virtue of the premises in this plea aforesaid, from and after the death of the said N. Swainson until and at the time when, &c., necessarily had, and still of right ought to have, a certain necessary way on foot, and with cattle, horses, and carriages, from the said highway over the said close in which, &c., to the said close, called Long Yarlside, and from the said last-mentioned close over the said close in which, &c., to the said highway, at all times of the year, for the necessary use and occupation of the said close called Long Yarlside, the same being such way as had been and was used in the lifetime and until and at the time of the death of the said N. Swainson, and the most convenient way over the said close in which, &c., to the said other close.—The plea then proceeded to justify the trespasses as the servant of the lord of the manor of Tunstal. The plaintiff took issue on this plea, and also new assigned.

At the trial, before *Crowder, J.*, at the last Lancaster Assizes, it appeared that the two closes in question, viz. the Far Close and Long Yarlside, adjoined and formed part of one estate, which in 1797 was purchased by one Leonard Craven, who in 1821 was succeeded by his nephew, Stephen Craven. S. Craven died in 1822, after devising the property to N. Swainson, who died intestate and without heirs, in March 1853. L. Craven occupied both closes himself; and from 1822 to 1853 they were in the occupation of the same tenant. On N. Swainson's death the two closes respectively escheated to the lords of the manors of Hornby and Tunstal, and it was admitted or assumed that the plaintiff and the defendant claimed under them. It was also admitted, on the part of the plaintiff, that the way now claimed by the defendant was used by the tenant of the two closes for the time being, in order to go from the highway which bounded Far Close on one side and Long Yarlside on the other; but it was contended, that so far from its being a way of necessity, another way was frequently used. The jury

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found a verdict for the defendant on the fourth plea, and also on the plea of not guilty to the new assignment. The learned Judge gave the plaintiff, who obtained a verdict on the other issues, leave to move to enter the verdict for him on the fourth plea, non obstante veredicto.

A rule having been accordingly obtained in Michaelmas Term—

Hugh Hill and *Cowling* now shewed cause.—The plea states a unity of seisin of the two closes in Swainson's lifetime, and a way of necessity over one to the other. Where a person is seised of two closes and there is no way of access to one except over the other, a grant of one involves a grant of the way. [*Parke, B.*—All ways of necessity arise from a presumed grant, but the lords of the manors are not grantees.] The first question to be determined is, what is the effect of the escheat? It is submitted, that, if Swainson, instead of dying without issue and the estate escheating, had made an actual grant to the lord in his lifetime without reservation, the law would imply a right of way; and a lord who takes by escheat, takes as a purchaser rather than in any other character, and subject to the incidents of the tenure. An escheat is a conveyance by act of law, and participates in the nature both of a purchase and a descent (a). Therefore, as the creation of a right of way is in the nature of an incumbrance, the lord must take subject to that incumbrance. The reason why a way of necessity is allowed is, that the land would otherwise remain out of cultivation. In *Pinnington v. Galland* (b), it was held, that a right of way may exist without any express reservation. The Court there says, "It no doubt seems extraordinary that a man should have a right which certainly derogates from his own grant; but the law is distinctly laid down to be so, and probably for the reason

(a) *Hargrave's Co. Litt.* 18. b., n. 2.

(b) 9 *Exch.* 1.

given in one of the authorities, that it is for the public good, as otherwise the close surrounded would not be capable of cultivation." The reason referred to is found in *Dutton v. Taylor* (a). [Parke, B.—Is there any authority for saying, that a right of way of necessity can arise except by grant.] In *Staple v. Haydon* (b), it is laid down that a stranger may have a right in three modes—by prescription, by grant, and of necessity; and that is recognised as law in *Pinnington v. Galland*.

Secondly. Assuming escheat to be equivalent to a conveyance, the right is properly alleged in the plea; for the form used is that given by the precedents: 1 Wms. Saund. 322 b, and 323 a, n. (o), and the precedent in Rastall, referred to in Chitty on Pleading, vol. 3, p. 1043, 6th ed. [Parke, B.—All the precedents allege a grant. But even assuming that escheat is equivalent to a grant, the only ground on which the lord of the manor can claim a way of necessity is that he has no other way. The plea does not contain any such averment.] The assertion of a right of way of necessity involves a denial of any other right; for the meaning of a way of necessity is, that there is no other way. The plaintiff might have shewn, on the issue taken on the plea, that the lord of Tunstal had another way, or he might have replied, that, although there was formerly a way of necessity, it had now ceased to exist; for the plea must be read with reference to the rule of law which reserves the way because a necessity for it exists: *Holmes v. Goring* (c). In *Dutton v. Taylor* the plea alleged that Cleaton was seised simul et semel of two closes, the Horseleasow and Owene Croft, and that he had no other way from a certain "vinelle" over Horseleasow, and that Cleaton conveyed Horseleasow to one Astbury, but continued to use the way. The case shews that this plea is good, without an averment that there was no other way. [Parke, B.

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(a) 2 Lutw. 1487.

(b) 6 Mod. 1.

(c) 2 Bing. 76.

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—There is a clear allegation of a grant in that case. The extent of the authority of *Holmes v. Goring* is, that, admitting a grant in general terms, it may be construed to be a grant of a right of way as from time to time may be necessary. I should have thought it meant as much a grant for ever as if expressly inserted in a deed, and it struck me at that time that the Court was wrong: but that is not the question now. *Alderson, B.*—Probably, if this case be taken to a Court of error, *Holmes v. Goring* will be reviewed.]

Atherton was not called upon to support the rule.

PARKE, B.—I am clearly of opinion that the plea is bad for not shewing a way of necessity at the time of the trespass complained of. It is consistent with the plea, that the lord of the manor of Tunstal had fifty other ways. But, even if the plea had contained a sufficient allegation of a way of necessity at the time, I am still of opinion that it would have been insufficient, and that no right of way of necessity can exist where the title of the parties is by escheat.

ALDERSON, B.—I am of the same opinion. It must be shewn that the party to whom the land was granted or escheated (supposing escheat were equal to a grant), had no other way. Here it is not alleged that the lord of Tunstal had no other way. It is a non sequitur to say, that because *N. Swainson* had no other way therefore the lord of the manor also had none.

PLATT, B., concurred.

Rule absolute.

1855.

HOPE and VICKERMAN, Assignees of A. DUNBAR, a
Bankrupt, v. MEEK.

Feb. 8.

TROVER by the plaintiffs, as assignees of Alexander Dunbar, a bankrupt, for the conversion of certain household and other goods.—Pleas: first, not guilty; secondly, that the plaintiffs were not possessed as assignees of the goods; and, thirdly, that the plaintiffs were not assignees as alleged. Upon these pleas issues were joined.

At the trial, before *W. H. Watson, Esq.*, at the last York Assizes, the following facts appeared:—The plaintiffs were the official and trade assignees respectively of Dunbar, the bankrupt, who carried on the trade of a boot and shoe-maker, at Halifax, in Yorkshire. On the 3rd of

A. B., having recovered judgment against C. D., issued execution thereon, and seized his goods under a writ of *fi. fa.* on the 3rd of December, 1851. On the morning of the 5th a notice was given to A. B. by the solicitors of certain of C. D.'s creditors, who afterwards

prosecuted a petition in bankruptcy against him. This notice stated, that it was given on behalf of several creditors of C. D.; that he had committed an act of bankruptcy, and also that he had, on the 4th (the previous day) executed a conveyance of all his property to trustees for the benefit of his creditors. On the afternoon of the 5th, the goods which had been taken in execution were sold. The petition in bankruptcy was presented on the 11th of December, and on the following day C. D. was adjudicated a bankrupt. The petitioning creditor was the president of a money club, and the preceding president had, in accordance with the rules of the club, in June, 1851, indorsed to him two promissory notes for 50*l.* each, expressed to be payable on demand, which were part of the property and securities of the club. The shares of the club were 50*l.* shares; and the bankrupt, who had been a subscriber for two shares previously to the month of May, became the purchaser of two shares, and had, with two sureties, executed the notes on his becoming such purchaser. According to the rules of the club, he was to pay 10*s.* per month on each share, and interest at 5*l.* per cent. upon the amount; and, by one of the rules, it was provided, "that, in case either of the sureties should die before the subscriber's share be paid up, such subscriber should have immediate notice, in writing, from the president and stewards, to provide a fresh surety, to the satisfaction of the committee, within a reasonable time, as the necessity of the case might require; and, in case of neglect, the committee should have power to recover the whole amount of such subscriber's share or shares then unpaid by an action at law." The bankrupt had paid all the monthly payments, and the interest due up to the time of his bankruptcy; but, in May, 1851, one of the sureties died, and a notice was sent to the bankrupt to provide a fresh surety, which he had neglected to do; and, at the time of the committing of the act of bankruptcy in November, 1851, more than 50*l.* remained unpaid to the clerk. The sum due upon the two promissory notes was relied on as the petitioning creditor's debt.

In an action by the assignees of the bankrupt against A. B., to recover the amount of the proceeds of the goods so sold after an act of bankruptcy, and notice under the 133rd section of the 12 & 13 Vict. c. 106:—*Held*, first, that the petitioning creditor's debt was valid; and, secondly, that the notice was sufficient.

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December, 1851, Dunbar's goods were seized under a writ of *fi. fa.* upon a judgment obtained against him by the defendant for the sum of 149*l.* On the following day, Dunbar executed an assignment of all his property and effects for the benefit of his creditors. On the morning of the 5th of December, the solicitors of several of the creditors served the following notice upon the sheriff's officer and the defendant :

"To Mr. James Meek, of York, to the High Sheriff of Yorkshire and his deputies and officers, and all others whom it may concern :

"We, the undersigned, as attornies for and on behalf of several of the creditors of Alexander Dunbar, of Halifax, in the county of York, boot and shoe-maker, hereby give you this formal notice, that the said Alexander Dunbar hath, on or before the 1st day of December instant, committed an act of bankruptcy, and hath also by deed, bearing date the 4th day of the present month of December, and made between the said Alexander Dunbar, of the first part; George Storey, of Halifax, aforesaid, leather dealer, and Joseph Vickerman, of Halifax, bookbinder, trustees for themselves and the rest of the creditors of the said Alexander Dunbar, of the second part; and the several other persons whose names and seals are thereunto subscribed and set, being respectively creditors of the said Alexander Dunbar, of the third part: assigned all and every his personal estate and effects unto the said trustees for the equal benefit of his creditors, and that a petition for adjudication in bankruptcy will be forthwith filed against the said Alexander Dunbar; and further, that if you proceed to a sale of the goods and effects whereof the said Alexander Dunbar was possessed, you will do so at your peril. Dated this 4th day of December, 1851.

"Yours, &c.,

"W. P. & F., Attornies at law."

In the afternoon of the same day, a bill of sale of the property seized under the writ of *fi. fa.* was executed by the sheriff's officer. A petition for adjudication in bankruptcy was dated and filed on the 8th of December, and was signed by the plaintiff Vickerman, who was the trade assignee and petitioning creditor. The claim, in respect of which the petitioning creditor's debt was founded, consisted of two promissory notes of 50*l.* each, made by Dunbar previously to May, 1851, and which were in the following form:—

"On demand, we jointly and severally promise to pay to Alexander Hoatson, or order, the sum of 50*l.* with lawful interest, value received.

"ALEXANDER DUNBAR,

"JOS. HOLT.

"J. BARKER."

These notes were indorsed by Hoatson to the plaintiff Vickerman, who was the president of a club established at Halifax, called "A Commercial Society; or, New Money Club," and of which Dunbar was a member. The proceedings of the club were regulated by certain printed rules, of which the following only are material to the present case:—

1. "This society shall be holden at the house of Mr. John Riley, the Union Cross Inn, Halifax, in the county of York, or at such other house as the majority of subscribers shall at the half yearly meeting appoint, and shall be held, continued, and carried on until each and every member shall have received the several shares for which he or she shall subscribe."

16. "That every member or subscriber shall pay to the stewards, towards the funds of this society, between the hours of eight and nine o'clock, every monthly meeting, the monthly sums or subscriptions following: namely, for each and every share of 50*l.* the monthly sum of 10*s.*"

21. "That when any lot is drawn or purchased, the

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money shall be paid to the member to whom it belongs, as soon as there is a sufficient sum ; such member together with two sufficient sureties giving such security, at his expense, as shall be approved of by the committee, for payment of the said lot or sum by the respective monthly instalments hereinbefore mentioned, according to the sum subscribed for, together with interest after the rate of 5*l*. per cent. per annum for the same, till paid ; the interest of the whole sum received to be paid every monthly night, till the whole principal be paid in by the instalments hereinbefore mentioned : and in case any member purchasing, or whose lot shall be drawn, shall not procure sufficient sureties by the time there is a sufficient sum of money in the fund to pay him, he shall pay interest for the money after the rate of 5*l*. per cent. till the following monthly night, when, if he does not find such sureties as aforesaid, his ticket shall be again returned into the bag or box, and another ticket drawn or sold, and such member shall pay 5*s*. for every 50*l*. share so returned besides the interest, as above mentioned."

22. "That if any member or subscriber, who having drawn or purchased his lot and received the money out of the club, and having given security for payment of his subscriptions as after mentioned, shall omit, neglect, or refuse to pay his subscriptions and all fines for such neglect, or the interest of the money he has received out of the club, an action shall be brought against him and his sureties upon the security given, and in that case payment of the whole amount remaining due upon such security will be compelled ; but the sureties, or any one of them, after paying all arrears and fines upon such share or shares, and giving additional security, if thought necessary by the committee, shall be allowed to contribute to such share or shares on precisely the same terms as the principal, and be equally amenable to all laws and regulations of this society."

24. "That a treasurer be appointed, to whom the stewards shall hand over all surplus money every meeting night, together with the promissory notes. All securities to be taken in the name of the treasurer. That, if at any time the committee shall think fit to appoint a new treasurer, the one retiring shall indorse or transfer all securities taken in his name to his successor."

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28. "That, in case either of the sureties provided by any subscriber should die, or become bankrupt or insolvent, or assign over his effects for the benefit of his creditors, or reside far from the place where he resided at the time he signed the promissory note given to the society before such subscriber's share and interest be paid up, such subscriber shall have immediate notice in writing from the president and stewards to provide a fresh surety, to the satisfaction of the committee, within a reasonable time, as the necessity of the case may require; and in case of neglect, the committee shall have the power to recover the whole amount of such subscriber's share or shares then unpaid by an action at law."

Dunbar had paid all the monthly subscriptions to the club, and all interest up to the time of his bankruptcy; but in May, 1851, one of the sureties died, and notice was given to the bankrupt to provide a fresh surety, which he had failed to do. At the time of the committing of the act of bankruptcy, in November, 1851, upwards of 50*l.* remained due upon these notes. The act of bankruptcy relied upon at the trial was the bankrupt's keeping house in November, 1851. This action was brought to recover the proceeds of the sale of the goods seized on the 5th of December under the writ of *fi. fa.*

On the part of the defendant it was submitted—first, that the petitioning creditor's debt was not valid; and, secondly, that the notice given on the 5th of December was insufficient.

The learned Judge overruled the latter objection; but

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reserved leave to the defendant to move to enter a nonsuit on the first; and he left it to the jury to say whether there had been an act of bankruptcy in November by Dunbar beginning to keep house. The jury having found that fact in the affirmative, a verdict was entered for the plaintiffs for 100*l.*, leave being reserved to the defendant to move to set the verdict aside and to enter a verdict for him in case the Court should be of opinion that the ruling of the learned Judge upon the first point was wrong.

Knowles obtained a rule nisi to enter a nonsuit, or for a new trial, on the three following grounds:—First, that there was no sufficient evidence of a debt due both at law and in equity to support a petitioning creditor's debt; secondly, that there was no sufficient notice of an act of bankruptcy; and thirdly, that the evidence of notice was not sufficient to bring the notice within the meaning of the statute, and that at all events the evidence ought to have been left to the jury.

Atherton and *J. Addison* shewed cause (Jan. 29 and 31) (a).—First, there was a good petitioning creditor's debt. The amount due in respect of the promissory notes to the petitioning creditor was a sufficient petitioning creditor's debt. The 91st section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, does not define the nature, but only the amount of such debt. And the form contained under the head of schedule "M," annexed to the Act, gives no further assistance. Now, these notes were payable on demand; and it may be a question as to the extent to which these instruments are affected by the rules of the society of which the bankrupt was a member. If, however, it is to be taken that these securities are controlled by the rules in question, it appears by the 28th rule, that the

(a) Before *Pollock*, C. B., *Parke*, *Parke*, B., however, did not hear *B.*, *Alderson*, B., and *Martin*, B. the latter part of the argument.

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holder was in a position to maintain an action upon them, to the extent, at all events, of the balance due and unpaid upon them. It will be contended on the part of the defendant, that, according to the 22nd rule, the notes are to stand as mere securities for the payment of the monthly subscriptions to the amount of the notes; and that by the due payment of such subscriptions the equities upon the notes are discharged. But, by the 28th rule, these notes became due and payable, subject to a deduction in respect of the amount paid upon them.

Secondly, the notice was sufficient. The 133rd section of the 12 & 13 Vict. c. 106, upon which this question turns, protects transactions made with a bankrupt under the circumstances therein specified, and enacts, in substance, that all executions and attachments against the goods and chattels of any bankrupt, *bonâ fide* executed and levied by seizure and sale before the date of the fiat or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person at whose suit or on whose account such execution or attachment shall have issued had not, at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, *notice of any prior act of bankruptcy by him committed*. The plaintiffs do not rely upon that part of the notice which refers to the deed of assignment. It will, however, be said, that the notice is too general in its terms, and that it ought to have specified the particular act of bankruptcy upon which the party giving the notice relied. The Legislature intended, in requiring a notice to be given, to put parties having dealings with a bankrupt trader on their guard, as the title of the assignees dates from the time of the act of bankruptcy. If a person, therefore, after receiving a notice of the true position of an insolvent trader still persists in transacting business with him, he does so at his peril. [*Parke, B.*—If the notice does not contain any

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mention of any specific act of bankruptcy, how is the person who receives it to ascertain the truth of it?] He is at liberty to make inquiries from that party from whom he receives it. If he does not avail himself of the information he must take the consequences, however serious they may be. In *Udal v. Walton* (a), a notice by a bankrupt to an execution creditor, that "he had committed several acts of bankruptcy," was held a sufficient notice of a prior act of bankruptcy within the 2 & 3 Vict. c. 29. *Pollock, C. B.*, there says, "Here there is a direct notice that acts of bankruptcy have been committed, and such a notice is on general principles sufficient to satisfy the Act of Parliament. There would be great inconvenience in putting any other construction upon it; for there are twenty different kinds of acts of bankruptcy, and it would be almost impossible to state with accuracy what ought to be the form of notice adapted to each act of bankruptcy." The 133rd section was passed for the purpose of protecting those persons only who use due diligence and care in transacting business. It will further be said, that, even assuming the defendant to have had a knowledge of the act of bankruptcy, still he had no sufficient notice within the true meaning of the 133rd section. Knowledge, however, of a fact includes notice of it. [*Parke, B.*—Where a party knows of an act of bankruptcy, as where he sees the act itself, he has notice of the act. If, therefore, he sees the bankrupt execute a deed by which he transfers all his property to his creditors, a formal notice to him is unnecessary.] It may also be said, that the notice was merely a speculative notice, as the parties by whom it was given had no knowledge of the facts it contained, and consequently that it is bad. If, however, the facts were true, the circumstance that they were not precisely within the knowledge of the giver of the notice is wholly immaterial. In

(a) 14 M. & W. 254.

Jennings v. Roberts (a), it was held, that, if a party to a bill of exchange gives a positive notice of dishonour, which afterwards turns out to be true, it is immaterial whether he had absolute knowledge of the fact at the time when he gave the notice. [*Parke, B.*—This question is also treated in the notes to *Cooper v. Chitty*, in 1 Smith's L. C., 237, c.] The term "notice" means such a reasonable notice as is sufficient to put the person dealing with the bankrupt on his guard. The last point appears to be involved in this question.

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Knowles and *T. Jones* in support of the rule.—First, there are several objections to the sufficiency of the petitioning creditor's debt. Although each of the promissory notes is on the face of it payable in præsentis, still they must be taken as controlled by the rules of this club. The holder of the notes was a mere trustee for the club of which the bankrupt was a member, and in the funds of which he had a direct interest. The 28th rule merely gives a right to maintain an action on a note, in case the maker of it fails to provide a fresh surety in the event of a vacancy, and if judgment be recovered in such action, the proceeds of the execution go to the general fund of the club. So that, in that view, a member has an interest in the fund till the club has ceased to exist. A Court of Equity would interfere to restrain an action brought upon these notes: *Ex parte Page* (b). In *Silver v. Barnes* (c), the nature of these clubs is well defined by the Court. There the members of a benefit society raised a joint-stock fund, portions of which were from time to time advanced to members of the society by way of loan, at 5l. per cent. interest; the sums so advanced were put up to competition among the members, and the members who bid highest obtained the loan. The defendant, who was a member of the society,

(a) 4 E. & B. 615. (b) 1 G. & J. 100. (c) 6 Bing. N. C. 180.

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bid 15*l.* 17*s.* 6*d.* for a loan of 80*l.*, and the sum which he bid was to be paid in addition to 5*l.* per cent. interest. The question raised was, whether the loan was usurious; and *Tindal*, C. J., in delivering the judgment of the Court, said,—“If it was a loan, it was usurious. We think it was a dealing with the partnership fund, in which the defendant had an interest in common with the other members of the society, and that it was not a loan. The defendant was interested in the fund when the money was advanced, and when it was repaid. The rules of the society are, in effect, a mere agreement by partners that their joint contributions shall be advanced for the use of one or the other as occasion requires; and the transaction was not a borrowing by the maker of the note from the payees.” *Jones v. Gretton* (a) may also be referred to for the same purpose. If this society be a partnership in which the petitioning creditor and the bankrupt are partners, the claim in which both are interested does not form a good petitioning creditor’s debt. The fact of the petitioning creditor being a mere trustee, also precludes the claim on the notes from being such a debt as that contended for by the plaintiffs. In *Ex parte Gray* (b), the Chief Judge, in delivering his judgment, said,—“This fiat is sued on the petition of Hannan alone. The deed creating the petitioning creditor’s debt shews that Hannan was a trustee only; a trustee cannot prove a debt as owed to himself, as he cannot swear the money is due to him; the cestui que trust must join in the proof, and swear the money has not been paid to him: *Ex parte Dubois* (c). Hannan could not strike the docket as on a debt due to him alone; and if he stated the fact that he was a trustee, then his cestui que trust must have joined in the affidavit of debt. A fiat, however, might be supported on the debt of a trustee alone, if the trustee had previously established the legal validity of his debt by an action at law.” In

(a) 8 Exch. 773.

(b) 2 Mont. & A. 283.

(c) 1 Cox, 310.

Guthrie v. Fisk (a), where a private Act of Parliament, intitled "An Act to enable a certain insurance society to sue and be sued in the name of their secretary," enacted that they might commence all *actions and suits* in his name as nominal plaintiff, it was held, that this did not enable the secretary to petition on behalf of the society for a commission of bankruptcy against the debtor. The principle of the decision in that case is applicable to this. *Holroyd, J.*, there says, "The statute does not use words which vest the debts in the secretary. It does not follow that he would be a creditor at all, and the names of the members of the society would not be mentioned in the petition; and therefore it would not appear whose commission it is. For these reasons, I think that the Legislature had in view only the ordinary proceedings by action at law, and perhaps suits in equity." The 28th rule does not apply, as the society never availed itself of the power thereby given by bringing an action. It therefore cannot be said that the notes were ever due and payable. In *Sarratt v. Austin* (b), it was held, that where two persons exchange acceptances, and before the bills are mature one of the acceptors commits an act of bankruptcy, there is not such a debt due from him to the other as will sustain a commission before the other has paid his own acceptance. Therefore, upon the grounds that the petitioning creditor is a mere trustee, that he and the bankrupt are jointly interested in the funds of the society, that the debt is not due, and that an action only, at the utmost, would lie, and that a Court of Equity would on terms interfere to restrain the action, the petitioning creditor's debt is not good.—They also contended that the notice was insufficient, but the argument on this point turned chiefly upon the mode in which the deed of assignment was given in evidence.

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Cur. adv. vult.

(a) 3 R. & C. 178.

(b) 4 Taunt. 200.

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The judgment of the Court was now delivered by

PARKE, B.—This was an action tried before Mr. *Watson* at the last York Assizes. It was brought by the assignees of a bankrupt named Dunbar, to recover a sum of money from the defendant, being the proceeds of goods of the bankrupt sold under a writ of *fi. fa.* after an act of bankruptcy, and notice under the 133rd section of the Bankrupt Act (12 & 13 Vict. c. 106), before the sale.

The levy was made on the 3rd of December, 1851. The notice was given at half-past nine on the morning of the 5th by the solicitors, who afterwards prosecuted the petition in bankruptcy; and it stated that it was given on behalf of several creditors of the bankrupt, that he had committed an act of bankruptcy, and also that he had on the 4th, (the day previously,) executed a conveyance of all his property to trustees, for the benefit of his creditors. The sale was made at one o'clock of the same day. The petition was presented on the 11th of December, and the adjudication was on the 12th.

At the conclusion of the plaintiffs' case, the learned counsel on behalf of the defendant objected; first, that the petitioning creditor's debt was not a valid one. The nature of it will be hereafter stated. Mr. *Watson* ruled that it was, but gave the defendant leave to move upon the point: secondly, that the notice was insufficient, upon grounds which will also be hereafter stated. Mr. *Watson* was of opinion that it was sufficient.

The learned counsel for the defendant then addressed the jury as to whether or not there had been an act of bankruptcy in November by beginning to keep house; and the jury having found that there was, a verdict was entered for the plaintiff. A rule was obtained to enter a nonsuit upon the point reserved, and for a new trial, upon the ruling of Mr. *Watson*, as to the notice; and it has been argued before us,

and we are of opinion that the ruling of Mr. *Watson* was right on both points.

The petitioning creditor was a person named Vickerman, who in June, 1851, was appointed the president of a money club established at Halifax; and the preceding president had, in accordance with the rules, indorsed to him two promissory notes for 50*l.* each, expressed to be payable on demand, which were part of the property and securities of the club. The shares of the club were 50*l.* shares, and the bankrupt, who had been a subscriber for two shares, became the purchaser of two; and he and two sureties had executed the promissory notes on his becoming such purchaser. According to the rules of the club, he was to pay 10*s.* per month on each share, and interest at 5*l.* per cent. upon the amount; and by the 28th rule it was provided, that, in case either of the sureties should die before the subscriber's share be paid up, such subscriber should have immediate notice, in writing, from the president and stewards, to provide a fresh surety, to the satisfaction of the committee, within a reasonable time, as the necessity of the case might require; and, in case of neglect, the committee should have power to recover the whole amount of such subscriber's share or shares then unpaid by an action at law.

The bankrupt had paid all the monthly payments and all interest due up to the time of his bankruptcy; but, in May, 1851, one of the sureties died, and a notice had been sent to the bankrupt to provide a fresh surety, which he had neglected to do; and at the time of the committing of the act of bankruptcy, in November, 1851, more than 50*l.* remained unpaid to the club.

The sum due upon these two promissory notes was the alleged petitioning creditor's debt. It was objected, that, the petitioning creditor being a trustee, a debt due to him could not be a good petitioning creditor's debt; and the case of *Ex parte Gray* (a) was cited.

(a) 2 Mont. & A. 283.

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In that case, it seems to have been considered by the chief Judge in bankruptcy, that a creditor, being a mortgagee in trust, could not be a petitioning creditor, unless with the acquiescence of the cestui que trust. In the present case, however, there was ample evidence of the acquiescence of the cestui que trust; and we apprehend that there is no doubt that, generally speaking, it is no objection to a petitioning creditor that he is a trustee.

A trustee may have quite as great an interest in the security and preservation of the debtor's property and the due administration of it under the bankrupt law as a creditor in his own right; and it has been held, that a debt due by the bankrupt to his wife's trustees is a good petitioning creditor's debt: *Ex parte Powell* (a). It is to be observed, that, in the case of *Ex parte Gray*, the cestui que trust had no right to recover the money alleged to be due from the bankrupt, and that a Court of Equity would have granted an injunction against any action at law by the petitioning creditor upon the covenant in the mortgage deed.

It was secondly contended, that nothing was due on the promissory notes; and that although, in order to a defence at law, no evidence could be given to contradict or vary the terms of the written instruments, yet in equity it was otherwise, and that a Court of Equity would have granted an injunction against the plaintiffs' proceeding at law on the notes; and if this were so, we concur that there would not be a good petitioning creditor's debt. Such a debt must be one for which an action could be maintained at law in the name of the petitioning creditor, as it must also be one which a Court of Equity would not restrain by injunction the prosecuting an action in respect of it. It must in fact be a debt which the creditor, according to the rules both of law and equity, is entitled to recover: *Ex parte Page* (b), *Sarratt v. Austin* (c). It being clear that the

(a) 1 Mont. B. L. 15. (b) 1 G. & J. 100. (c) 4 Taunt. 208.

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petitioning creditor in the present case could have maintained an action at law, the question is, whether a Court of equity would have restrained him; and this entirely depends upon the true construction of the 28th rule; and we think that, upon the bankrupt failing to provide the fresh surety in compliance with it, the whole amount of his shares then unpaid became due, according to his real contract, and that a Court of equity would have no power to restrain the petitioning creditor, being the indorsee of the promissory notes, from insisting upon the immediate payment of this sum, which it has been already stated exceeded the sum necessary to be a petitioning creditor's debt.

It was further contended, that, even if this were so, an action at law could only be maintained, and that no petition in bankruptcy could be presented, and for this *Guthrie v. Fisk (a)*, was cited; but we do not think it applies. No debt was there due to the petitioning creditor at all, he was merely the secretary of the *creditors*; and the parliamentary power only enabling him to commence actions and suits, the Court held he had no power to issue a fiat in bankruptcy. In the present case we think the amount unpaid was a debt due to the petitioning creditor; and when the other necessary circumstances concur, a debt to the requisite amount confers upon the creditor the power to present a petition in bankruptcy as a right: *Ex parte Gray*.

It was also contended, that the bankrupt was a partner with the petitioning creditor in the money club, and that, therefore, there could be no petitioning creditor's debt; and for this *Silver v. Barnes (b)* and *Jones v. Gretton (c)* were cited. It is true, that in a sense and to some extent there was a partnership, or rather a joint interest, amongst the members and subscribers to the club, but it was not at all such a joint interest as disentitled the petitioning creditor to a

(a) 3 B. & C. 178. (b) 6 Bing. N. C. 180. (c) 8 Exch. 773.

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present payment of the amount unpaid by the bankrupt, which, in our opinion, is the true test of the petitioning creditor's debt. We are, therefore, of opinion, that the petitioning creditor's debt was a true one.

The second ground upon which this rule was granted was as to the notice. The Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106). sect. 133, provides, that an execution shall be valid, notwithstanding a prior act of bankruptcy, provided the person at whose suit it issues had not, at the time of the sale, notice of any prior act of bankruptcy committed by the bankrupt. As has been already stated, the notice relied on in the present case was given before the sale by the solicitors who prosecuted the petition in bankruptcy, and purported to be, and no doubt really was, on behalf of several creditors of the bankrupt; and it stated that the bankrupt had committed an act of bankruptcy, and had also executed a conveyance of all his property in trust for his creditors on the 4th of December (the day before the notice was given). The deed of conveyance was proved by the attesting witness, and put in evidence. A misapprehension, we have no doubt, exists as to the object for which this document was used. We cannot doubt but that it really was for the purpose of making good the notice, although not so understood by the learned counsel for the defendant. It was an act of bankruptcy, and a commission, fiat, or petition in bankruptcy could have been supported by it, for the petitioning creditor was one of the trustees mentioned in it; but he did not execute or assent to it, nor did the property which it purported to convey pass to him without his assent, as would be the case if it had been simply a conveyance for his benefit till he dissented.

Now, if there may have been any question as to the sufficiency of the notice coming from the solicitors for the creditors only, and supposing it to have contained merely general terms, specifying no particular act of bankruptcy, the same objection certainly does not apply to that part of it which

states that a deed of conveyance of all his property had been executed by the bankrupt on the 4th of December. This intimation is surely particular enough, and, coming from the solicitors to the creditors, was quite sufficient. Where an act of bankruptcy has been in fact committed, any communication which brings to the knowledge of the execution creditor before the sale the alleged fact, that an act of bankruptcy has been committed, in a way which ought to induce him as a reasonable man to believe that the notification was true, is in our judgment a sufficient notice.

For the above reasons we think the ruling of Mr. *Watson* on both points was right, and that the rule ought to be discharged.

Rule discharged.

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SIMPSON v. EGGINGTON.

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THE declaration was for money had and received.—Pleas, never indebted and set-off, upon which issues were joined.

At the trial, before *Alderson*, B., at the last Stafford Summer Assizes, it appeared that the action was brought by the plaintiff as clerk to the corporation of the City of Lichfield, to recover certain monies paid to the defendant as their former clerk on account of the corporation. The defendant sought to set off a sum of 15*l.* 15*s.*, which he alleged to be due as a year's salary. It further appeared that one Proffit, who acted as treasurer to the corporation, had paid the defendant the above amount for his year's

It is a good answer to a plea of set-off, that the amount has been paid by a person professing to act as agent for and on account of the plaintiff, though without his authority; and that the latter ratified the act at the time of the trial.

The treasurer of a corporation paid their clerk

(the defendant) the amount of his year's salary, both parties believing at the time that the treasurer had the authority of the corporation to make such payment; but the treasurer had no such authority, and the corporation afterwards repudiated the payment and dismissed the defendant from their service. In an action against the defendant for the recovery of certain monies paid to him on account of the corporation:—*Held*, that the corporation was entitled, at the trial, to ratify the act of their treasurer, and, consequently, that the defendant could not set off the amount of his salary as due to him from the corporation.

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salary, believing at the time that he had the authority of the corporation to make the payment on their behalf. He had however no such authority, and the corporation afterwards made a resolution by which they repudiated the payment and dismissed the defendant from their service. The defendant had treated this payment as made on behalf of the corporation, and had not returned it. In answer to the plea of set-off, the corporation now relied on this payment.

On the part of the plaintiff, it was submitted that the corporation was entitled to ratify the act of their treasurer at the time of the trial. This was disputed on behalf of the defendant. The learned Judge left the case to the jury, who found a verdict for the plaintiff for 26*l.* 19*s.* 4*d.* disallowing the the defendant's set-off; but he reserved leave to the defendant to move to reduce the verdict by the sum of 15*l.* 15*s.* the amount of the set-off.

Keating having obtained a rule nisi accordingly,

Whateley and *J. Gray* shewed cause (Jan. 26), and contended that the corporation was entitled to ratify the act of the treasurer at the time they sought to do so.

Keating, in support of the rule, contended that the corporation ought to have ratified the act of their treasurer before action brought, but that instead of so doing they had repudiated it; and that therefore the money was not paid by them, and that *Proffit* might have maintained an action against the defendant for the recovery of the amount as for money paid under a mistake of fact.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The question is, whether the fifteen guineas claimed by the defendant for wages may be set off.

The facts are, that, after the debt accrued due from the corporation to Eggington, one Proffit, who was their treasurer, and appeared to defendant to be acting with the authority of the corporation and as their agent, but in truth had no previous authority from them to pay the debt, paid the full amount to Eggington as from them; but the corporation afterwards disapproved of and determined not to repay the same to Proffit, and had disallowed it in his accounts, and had not before the suit at any time ratified such payment; but they had never communicated their disavowal to Eggington, who, down to the commencement of the suit, must have believed the debt to have been paid by the corporation.

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After the commencement of the suit, when the defendant pleaded his set-off, the corporation insisted that the fifteen guineas had been paid by Proffit, and thereby may be said to have ratified the payment made by Proffit in the same way as if they had pleaded payment by way of replication to the plea of set-off.

Under these circumstances, is this payment by Proffit to be treated as a payment by the corporation to Eggington?

The general rule as to payment or satisfaction by a third person, not himself liable as a co-contractor or otherwise, has been fully considered in the cases of *Jones v. Broadhurst* (a), *Belshaw v. Bush* (b), and *James v. Isaacs* (c); and the result appears to be, that it is not sufficient to discharge a debtor unless it is made by the third person, as agent, *for and on account* of the debtor and with his prior authority or subsequent ratification.

In the first of these cases, in an elaborate judgment delivered by Mr. Justice *Cresswell*, the old authorities are cited, and the question whether an unauthorised payment by, and acceptance in satisfaction from, a stranger is a good

(a) 9 C. B. 193. (b) 11 C. B. 191. (c) 22 L. J., C. P., 73.

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plea in bar, is left undecided. It was not necessary for the decision of that case. In *Belshaw v. Bush*, it was decided that a payment by a stranger considered to be *for* the defendant and *on his account*, and subsequently *ratified by him*, is a good payment; and in the last case of *James v. Isaacs*, a satisfaction from a stranger without the authority, prior or subsequent, of the defendant, was held to be bad. We consider therefore the law as fully established by these cases. In this case the payment was made by Proffit for the corporation, and as their agent; but he had no prior authority to make it, but was fully believed by Eggington to have it. But was there any authority by subsequent ratification so as to make the payment a good answer? In the case of *Belshaw v. Bush*, the Court of Common Pleas considered that the defendant (for whom it appeared on the plea (as the Court considered) that a stranger had made a payment to the plaintiff,) ratified that act by pleading a plea of payment; and though the ratification in that case was subsequent to the commencement of the suit, it was held to be good.

The case of a plaintiff insisting, on evidence, that a debt sought to be set off has been paid, is on a similar footing to

the judgment of this Court, delivered by Lord *Cranworth* in the case of *Bird v. Brown* (a), in which the subject of ratification was much considered.

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No question arises as to a retrospective ratification by the principle of a *tort* done by one meaning to act as his agent, as to the effect of which to render the act punishable, if done at the time without authority, grave doubts are suggested in that case. The rule therefore must be discharged.

Rule discharged.

(a) 4 Exch. 798.

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THE declaration stated that Wylam's Steam Fuel Company, being a company completely registered under the 7 & Vict. c. 110, sued the defendant: For that he, as the holder of 200 shares in the company, was indebted to the company in a certain sum for calls.

The defendant, a shareholder in a joint-stock company completely registered, became bankrupt and obtained his certificate. By

the company's deed of settlement, the shareholders covenanted respectively, that they or their executors, administrators, or assigns, would pay, in manner thereafter directed, the amount of all calls required to be paid on their shares; and, by one of the clauses of the deed, no assignees of a bankrupt or insolvent shareholder should be entitled to become shareholders in respect of any shares held by such bankrupt or insolvent; but the assignees were to be entitled to sell the shares, upon leaving with the secretary the official copy of the documents necessary to establish the bankruptcy and the right of the assignees. By a subsequent clause, the directors of the company were empowered, when the circumstances of the company should require it, to call upon all the shareholders, "other than the deceased or bankrupt or insolvent shareholders, their executors or administrators or assigns respectively," to pay up the calls made on their shares. By subsequent clauses, the directors were empowered, in case of the non-payment of calls by the shareholders, to declare such shares forfeited to the company and sell them; the rights of assignees to prior dividends being preserved to them, with leave also to the shareholders, whose shares should be so forfeited, to tender the amount of the calls before sale &c., and to redeem the shares, and to be and become holders of the shares again. After the bankruptcy of the defendant, the directors made a call and sued him in respect thereof. The assignees did not take any steps to sell the shares:—*Held*, that, on the bankruptcy of the defendant, he ceased to be a shareholder liable to calls; and, consequently, that his bankruptcy was a good defence to the action for calls made subsequently thereto.



the rate of 5*l.* per cent. per annum, to be computed from the day on which the same ought to have been paid; provided also that a second call shall be made, and the instalment thereon be payable within a period of six calendar months after the day to be fixed for the payment of the said first instalment as aforesaid, and a third call shall be made, and the instalment thereon be payable within a period of twelve calendar months after the same day to be fixed for the payment of the said first instalment as aforesaid, but that no further call, after the second and third calls have been made and the instalments thereon paid in respect of any or either of the shares in the said company, or of the several instalments to be due thereon respectively, shall be made without the consent of the shareholders, to be certified in like manner as is hereinbefore provided for the taking the sense of the shareholders when convened at their meetings, assembled at some general meeting, whether ordinary or extraordinary, at which the question shall be put and decided; provided further, that it shall be lawful for the board of directors, if and when they shall think fit so to do, to receive, from any one or more of the shareholders willing to advance the same, all or any part of the monies which may be called for upon their respective shares beyond the sums actually called for, and upon the principal monies which shall be so paid in advance, or so much thereof as from time to time shall exceed the amount of the calls actually made and payable upon the shares in respect or on account of which such advance shall have been made, to agree to pay or allow, and to pay or allow accordingly, interest at and after such rate, but not exceeding the rate of 5*l.* per cent. per annum, as the shareholder or shareholders paying such monies in advance as aforesaid and the board of directors shall agree upon."—The plea then averred, that, after the defendant became the holder of the said shares, he, then being a trader within the meaning of the statutes in force concerning bankrupts, became indebted to the

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Governor and Company of the Bank of England in 50*l*. and upwards for a true and just debt, and, being so indebted, committed an act of bankruptcy within the true intent and meaning of the said statutes; and thereupon, upon such petition of the said Governor and Company of the Bank of England, and upon such affidavit being filed and bond being given as by the statute in that behalf was required, such proceedings were had, on the 19th of December, A.D. 1848, that the Lord High Chancellor of Great Britain issued his fiat under his hand, authorising the said creditor to prosecute his complaint before the Court of Bankruptcy for the London district, according to the said statutes; and such proceedings were thereupon had, according to the form of the said statute, that afterwards, on the 21st of December, 1848, the defendant was duly adjudicated bankrupt by the said Court, and assignees of the estate and effects of the defendant were then, according to the said statutes, appointed; and the defendant afterwards obtained his certificate of conformity in due form of law, and the said fiat and the proceedings thereunder have ever since been and still are in full force; and the plaintiffs, during the several times at which the said several instal-

and executed the same as a subscriber for and holder of 200 shares in the said company, being the said shares in the declaration mentioned; and the plaintiffs say, that in the said deed of settlement of the said company there was and is contained or recited in the words following, that is to say:—"And whereas the parties hereto of the first and second parts respectively have agreed to form the said company, on the terms and for the period hereinafter mentioned, for the purposes of exercising the privileges secured by the said articles of agreement of the 13th of March last, and of using the works and premises therein contracted for, and for the other purposes therein and hereinafter appearing, and to raise a capital not exceeding 100,000*l.* in 5000 shares of the value of 20*l.* each, with power to increase as hereinafter mentioned; and whereas the said shares are numbered in regular order, commencing with the number 'one,' and ending with the number 'five thousand,' and each of the several persons parties hereto of the first and second parts (thereinafter called shareholders) have taken shares in the capital of the said company, and the number or numbers of the shares so taken by each of the said parties respectively is or are written opposite to his or her respective name or names in the schedule, Part 3, thereunder written." And in the said indenture was also contained a covenant by each of the parties of the said first and second parts, with the person therein named as the trustee appointed in pursuance of the provisions of the said recited Act, that they the said shareholders respectively, or their respective executors, administrators, or assigns, would pay up, in manner hereinafter directed, the amount of all instalments or calls required to be paid, as thereafter provided, on the shares taken by such shareholders respectively, and would perform the several engagements in those presents contained, and on the part of the shareholders respectively to be performed; and in the said deed of settlement

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there were also contained, amongst others, the several clauses following, that is to say,

1. That the several persons, parties to these presents of the first and second parts, all of whom are hereinafter distinguished by the title of shareholders, and the several other persons who shall become shareholders, as hereinafter is mentioned, shall and will be, continue, and remain adventurers, associated together for the purpose of manufacturing and vending the artificial fuel, heretofore commonly called "Wylam's Patent Fuel," but which henceforward it is intended shall be called by the name of "Wylam's Steam Fuel," and shall for ever continue and be a company or partnership for the purpose of exercising the licenses to use the patent inventions hereinbefore referred to, any or either of them, and also for the purposes of granting sub-licenses to use the same inventions, or any or either of them, as well in Great Britain and Ireland and the dominions pertaining to the Crown thereof, as also in France, Spain, and Belgium, or elsewhere, and for exercising all the other rights and privileges secured by the said hereinbefore recited agreement of the 13th day of March last, and for the purposes of manufacturing, in Great Britain or elsewhere, fuel by any improved or other process or means, and vending the same, and vending all or any educts from any such process or manufacture, to and for the purposes hereinafter mentioned, by and under the same title or firm of Wylam's Steam Fuel Company, and under and subject to the several stipulations, conditions, restrictions, clauses, and provisions hereinafter contained, that is to say,—

12. That the capital of the company shall consist of the sum of 100,000*l.* in 5000 shares of 20*l.* each, and the shares taken, the amount paid thereon, and the names and addresses of the said shareholders, and the number of shares to which such shareholders shall respectively be entitled, distinguishing each share by its number, and the amount of the

instalments paid on such shares, and every change of proprietorship of any share or shares, shall be entered in books to be prepared and kept by the said board of directors, in manner directed by and according to the regulations of the said Act for the Registration, Incorporation, and Regulation of Joint Stock Companies, and the said entries shall constitute the registry of such share or shares.

68. That the board of directors shall, in every year, after payment and satisfaction of the fine or royalty to become due and payable to the said Ralph Wylam, William Wylam, Charles Bertram, William Parkinson, and Joshua Greene the younger, their heirs, executors, administrators, or assigns, and of all the debts and outgoings of the said company for the year, so far as the same shall have been or be capable of being ascertained, recommend for the approval of the ordinary general meeting to be holden on or about the first Wednesday in the month of March in every year, that a sum not less than one-fifth in any one year shall be set aside out of the clear profits of the said company for the past year, for the purpose of the said reserved fund; and that the residue of the said surplus income, after deducting the sum so to be recommended for the said reserved sum, shall be divided amongst all the shareholders of the said company in proportion to the capital which they shall have been called upon to subscribe; and the board of directors shall, upon the approval thereof by such annual general meeting to be holden as aforesaid, cause every such dividend to be paid by the secretary, at the office of the company or at the bankers of the company, at and after the end of thirty days from the time when the same shall have been declared; and within fifteen days after such dividend shall have been so declared, the board shall cause a circular letter to be sent to each shareholder, informing him or her of the amount of dividends, and when and where the same shall be payable.

69. That the board of directors shall cause to be kept

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in a book a register of shareholders, in which book shall be entered the names, occupations, rank, or usual title, together with the place of business (if any) and the place of residence, of such shareholder respectively, and the number of shares they hold respectively, and the amount of instalments paid on such shares respectively.

87. That no shareholder shall be at liberty to transfer his or her share or shares except to such person and persons, and likewise in such manner, as the board of directors for the time being shall approve, according to the provision (in the latter behalf) in the said Act for the Registration, Incorporation, and Regulation of Joints Stock Companies contained.

89. That every person who shall become an original shareholder or the holder of a new share after the day of the date of these presents, shall immediately on becoming such shareholder pay to the bankers for the time being of the said company, to the credit of the directors of the company, the amount of all the instalments which shall then have been called for on the shares originally taken at or before the date and first execution of these presents, together with such interest (if any) on such instalments respectively as the said board of directors shall think fit to require.

93. That, before an executor, administrator, legatee, or next of kin of a deceased shareholder can be registered as a shareholder in respect of the share or shares of such deceased shareholder in the capital of the company, or sell the same, he or she shall leave or cause to be left with the secretary, at the office of the company, a notice in writing expressing his or her desire to become such shareholder, or to sell such share, and subscribing his or her name and place of residence, and the share or shares in respect of which he or she claims to be a shareholder; and shall also leave the probate of the will or letters of administration under which he or she shall claim to be entitled to such share or shares, or such office copy or extracts of or in relation to the said will, or letters of administration, as the board of directors

may require; and upon such title being proved to the satisfaction of the said board, the said board shall require such executor, administrator, legatee, or next of kin to be duly registered in the books of the company pursuant to the provisions contained in the aforesaid Act of Parliament.

94. That no assignees of bankrupt or insolvent shareholders shall be entitled to become shareholders in respect of the shares held by such bankrupt or insolvent shareholders in the capital of the company, but that such assignees shall be entitled to sell the same upon leaving, or causing to be left, with the secretary at the office of the company an office copy of the fiat, declaration, certificates, and other documents necessary for establishing the fact of such bankruptcy and insolvency, and the estate of the assignee or assignees.

103. That in case any shareholder (save as in the special proviso appended to this clause hereinafter excepted), or the executors, or administrators, or assignees of a deceased or bankrupt or insolvent shareholder, shall not in respect of every share of such shareholder in the capital of the company pay any further instalment, so for the time being called for, on or within thirty days after the day and at the place to be mentioned in the said notice for the payment thereof, then and in every or any such case the secretary of the company shall certify the same to the board of directors, and thereupon the board of directors shall cause a letter to be sent to such shareholders, or to such executor, administrators, or assignees, informing him, her, or them of the resolution, and of the notice given thereof; and further, if the instalment, or such part thereof as shall not have been so paid, shall not be paid within thirty days from the time of sending such letter at the place to be therein mentioned for that purpose, then all and every the share or shares of such shareholder in the capital of the company shall be hereby subject to be forfeited to the company; and if the same shall not be so paid, then and in every such case it

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shall be lawful for an extraordinary meeting of the board of directors specially called for the purpose, if such board shall think proper (but they shall not be obliged to do so), to direct an action or suit to be commenced and prosecuted, in the name of the said company or otherwise, against such shareholder, or the executors, administrators, or assignees of any deceased or bankrupt or insolvent shareholder for the amount of such instalment and interest thereon from the day on which the same became payable, and also to declare that all and every the shares or share, or any of the shares in the capital of the company, belonging to the shareholders or shareholder who or whose executors, administrators, or assigns shall so refuse, or neglect, or omit as aforesaid, and all benefits and advantages whatsoever attending the same, shall be thenceforth forfeited or extinguished for the benefit of the company or sold; and it shall be lawful for the directors, at any time after such neglect, refusal, or omission as aforesaid, and after giving to every such shareholder twenty-one days previous notice in writing of their intention so to do, such notice to be sent to the place of address set opposite the name of every such shareholder in the share book of the said company, without any further or other consent of such shareholder, absolutely to sell and dispose of every such share, either by public auction or by private contract, and shall and do apply the proceeds of such sale, first, in payment of the expenses attending such sale, then in and towards payment of the calls or instalments due thereon, and interest thereon as aforesaid, and after full payment and satisfaction thereof respectively the surplus (if any) shall be paid to such shareholder; and for the purpose of effecting such sale and sales the directors, or any three of them, shall have power to assign and transfer such share or shares into the name of the purchaser or purchasers thereof without any further concurrence or authority of or by such shareholder making default as aforesaid, and the receipt and the receipts of any

three of the directors shall be sufficient discharges to the purchaser or purchasers of the same, and that no purchaser or purchasers shall be bound or obliged to see that any such default shall have been made as aforesaid, and the directors shall have power thereupon to expel from the company such shareholder or shareholders, if he or she or they shall be living: provided, nevertheless, that the rights of such shareholders, or the executors, administrators, or assigns of such deceased, or bankrupt, or insolvent shareholder to the dividends accrued in respect of such share or shares at the time of such forfeiture or forfeitures, shall not be prejudiced thereby; and also provided that nothing in these presents contained shall be construed as applying to or affecting in any manner the instalments to grow due on the calls to be from time to time made in respect of the one thousand shares allotted to the said Ralph Wylam, William Wylam, Charles Bertram, William Parkinson, and Joshua Greene the younger, or any or either of them respectively, or any other additional shares taken and subscribed for, or to be taken and subscribed for, by them, or any or either of them, so long as there shall remain unpaid any portion of the sum and sums of money to be found due and payable to them, the said Ralph Wylam, William Wylam, Charles Bertram, William Parkinson, and Joshua Greene the younger, their executors, administrators, or assigns, or any interest thereon, under and by virtue of the said hereinbefore recited agreement of the 13th day of March last, or of any deed or instrument to be executed in pursuance or furtherance thereof.

104. That in case any shareholder whose shares shall have been forfeited shall, before any sale or sales thereof, tender to the secretary of the said company the whole amount of the calls and instalments which shall at the time of such tender be due and payable on such shares respectively, together with interest thereon at the rate of 5*l.* per centum per annum from the time such calls were respectively payable,

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together with the amount of the costs, charges, and expenses which the said company shall or may have incurred by means of such forfeiture, or in proceeding to effect a sale or sales of such share or shares, it shall be lawful to and for the said board of directors to restore to such shareholder the share or shares so forfeited, but subject and so nevertheless, that such shareholder shall not be entitled, in respect of any such share or shares, to any dividend to be declared between the date of the forfeiture of such share or shares and the declaration of the dividend next after each restoration of such share or shares, and also without prejudice to the forfeiture and sale thereof as aforesaid, in case of default in the payment of any subsequent calls thereon from time to time.

105. That no shareholder or shareholders shall exercise any privilege in the said company during the time any calls shall be or remain unpaid by him, her, or them.

The replication then averred, that, from and after the making of the said indentures up to and at the time of the said bankruptcy of the defendant in the plea mentioned, the defendant continued to be and was the holder of the said shares, and entitled to all the benefits and privileges and subject to all the liabilities incident thereto under and by virtue of the said deed of settlement; and that the said assignees of the estates and effects of the defendant did not at any time take to or accept the said shares or any of them, or do any act or thing whereby the said shares might, or could, or did become vested in them as such assignees, or whereby they might, or could, or did become entitled to sell the same or any of them, and the same were not nor was any or either of them ever vested in the said assignees; and the defendant then and from thence continually, until and at the time when the said calls respectively were made and the said instalments respectively became due and payable, was and continued to be and still is the holder and proprietor of the said shares, and entitled to all the rights,

benefits, and privileges thereof or belonging thereto, and that the said calls were and each of them was made, and the said respective instalments became due, long after the granting and confirming of the said certificate of conformity and the declaration of a final dividend out of the estate and effects of the defendant as such bankrupt, and long after the said assignees had ceased to act as such, and long after the defendant was bankrupt as in the plea mentioned, and long after the expiration of a reasonable time for the said assignees to do all such acts as were necessary or required for vesting in them the property in the said shares, or entitling or enabling them to sell the same.

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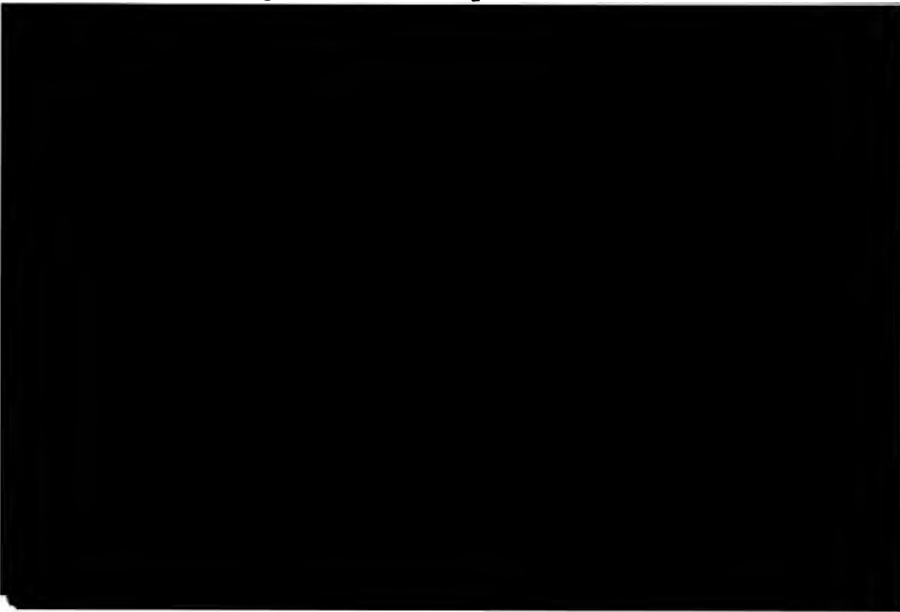
Demurrer and joinder.

Willes argued in support of the demurrer in last Term (January 22).—The defendant, by his bankruptcy, which preceded the calls, was relieved of all liability in respect of such calls. The company is completely registered in pursuance of the 7 & 8 Vict. c. 110; but that statute gives the company no additional power to make calls. Their case, therefore, rests solely upon the authority given to them by the deed to make calls, and that power is not to be exercised by them in the event of the bankruptcy or insolvency of a shareholder. This appears by the clause set forth in the plea. Even in the absence of any such express provision in the deed, the bankruptcy of a shareholder would ipso facto, as regards the shareholder, be a dissolution of the partnership; and therefore, independently of the express provision in the deed, the company would have had no power to make the call after bankruptcy. The judgment of Sir *J. Parker*, V. C., in *Greenshield's case* (a), is wholly in the defendant's favour. There, a shareholder in a joint stock company became bankrupt,

(a) 5 De G. & S. 599.

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and subsequently the company ceased to carry on business, and its affairs were ordered to be wound up under the Winding-up Acts. By the company's deed of settlement the assignees of any bankrupt shareholder were authorised to sell his shares. The assignees of this bankrupt shareholder did not avail themselves of that provision. The Master placed the names of the assignees on the list of contributories, as liable in respect of the bankrupt's estate up to the bankruptcy, on which the assignees disclaimed. The Master then placed the name of the bankrupt, who was certificated, upon the list, as liable in respect of calls made subsequent to his bankruptcy. Sir *J. Parker*, V. C., after stating that the partnership was dissolved by the bankruptcy, says, "that right is not varied by the clause in the deed, that the assignees might part with the interests of the bankrupt, if they could find anybody willing to take them, who would thereupon become a shareholder. As that was not done, the concern was dissolved as to the bankrupt's interest in it. The debt, if any there were upon the statement of the accounts at the bankruptcy, was a proveable debt; and I can see no right in the partnership, as against the bankrupt, to incur debts after the bank-



Vict. c. 16,) the shares in which were shares in property of a continuing nature. The principles of an ordinary partnership do not apply to such a case, because the shares remain as property, and if the assignees disclaim them, they remain in the bankrupt, who continues liable on the covenants in respect of them." The reasons there given are the foundation of the defendant's argument. The 8 & 9 Vict. c. 16, upon which the decision in the *South Staffordshire Railway Company v. Burnside* proceeded, has no application to this case. The bankrupt ceased to have any interest in the shares. His assignees might have disposed, and may even now dispose of them. *Chapple's case* (a) is an additional authority in favour of the defendant. There, a joint stock company completely registered became bankrupt; one of the members of the company had previously been declared bankrupt, and had obtained his certificate. The Master placed the bankrupt's name on the list of contributories and calls were made by the Master on him for contributions to discharge the liabilities of the company incurred before his bankruptcy: Sir *J. Parker*, V. C., held that the bankruptcy certificate was a bar to the liabilities to satisfy which the calls were made, and that the bankrupt's name ought to be removed from the list of contributories.—He also referred to the 188th section of the 12 & 13 Vict. c. 106.

Bovill, contra.—The defendant is liable to pay these calls. The question turns on the construction of the deed of settlement, taken in connection with the 7 & 8 Vict. c. 110. The 7th section of that Act, which regulates the constitution of these companies, makes a deed essential; and the 55th section empowers the company to proceed against a defaulting shareholder for the recovery of calls. The assignees have not elected to sell the shares. If they

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(a) 5 De G. & S. 400.

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intended to adopt that course they should have done so within a reasonable time; and not having signified such intention nor done any act, they have lost their right. The defendant, therefore, still retains the shares. In *Chapple's case*, the call was not made by the company under a deed, but by the Master under the Winding-up Acts. In *Greenshield's case* the proceeding was taken under the same Acts. Those cases have no application to this. *Ex parte Broadbent (a)* appears to be more analogous. There, a coal mine was worked by several persons under a lease, the articles of partnership giving each a power of pre-emption in case any partner wished to dispose of his share; a partner deposited an attested copy of the lease in order to give an equitable mortgage on his share to a stranger, and it was there held, that the Court of Bankruptcy could not make the usual order for sale, &c., as the partnership accounts must first be taken, which that Court had no jurisdiction to do; and that the case was not free from doubt. Now this deed commences with a clause containing an absolute covenant by the defendant to pay the calls. The 94th clause entitles the assignees of a bankrupt to sell his shares. And the 102nd clause, which empowers the directors to require the shareholders to pay up the calls, excepts "*the bankrupt or insolvent shareholders, or their assigns respectively,*" is intended to except bankrupts in cases where their shares are disposed of in pursuance of the 94th clause. The 102nd clause, therefore, does not apply to the general case of bankruptcy. The 103rd and 104th clauses fortify this construction.

Willes replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—(His Lordship, after stating the pleadings,

(a) 1 Mont. & A. 635.

proceeded.) The question in this case depends entirely upon the construction of the deed, all the material clauses in which are set out in the replication. It is, whether the bankruptcy of the defendant, with or without his certificate, is an answer to the claim of the plaintiffs for calls. The material question is, whether the bankruptcy discharged him from liability; for if it did not, and he continued a shareholder, the certificate would be no bar: *South Staffordshire Railway Company v. Burnside* (a).

The question then is, whether, according to the terms of this particular deed, a shareholder on becoming bankrupt ceased to be a shareholder liable to calls? We think that he did. The covenant to pay calls is not absolute, but qualified by the subsequent clauses. The shareholders covenant that they, or their executors or assigns, would pay up, *in manner thereafter directed*, the amount of all instalments or calls to be paid *as thereafter provided*. One subsequent provision is, that they and the other shareholders will remain associated together for the purpose of the trade; that the surplus of the income shall be divided amongst the shareholders; and that no assignees of a bankrupt shall be entitled to become shareholders in the capital, but they shall be entitled to sell the shares upon leaving with the secretary the official copy of the documents necessary to establish the bankruptcy, and the estate (i. e.) right of the assignees.

From this it would appear, that, in the event of bankruptcy, which ordinarily dissolves all partnerships, and leaves the assignees the share of the bankrupt and the right to have the partnership fund divided, and an account taken of the bankrupt's share, the assignees in this case would have no such right, but would only have the power of selling the share and substituting the purchaser as a shareholder, together with the right to any dividends unpaid

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(a) 5 Exch. 129.

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before the bankruptcy; all the right of the bankrupt in the fund ceases, unless he has the power, by a subsequent clause which will be afterwards noticed, to redeem the shares, if the assignees refuse to exercise the power of selling to a purchaser. A similar provision is made in the case of death or insolvency, both of which, like bankruptcy, cause a dissolution of partnership. The bankrupt, therefore, had ceased by his bankruptcy to be a shareholder. The next clause, which enables the board of directors to make calls on all the shareholders, most reasonably and most consistently excepts bankrupts, and deceased persons, and insolvents, who have all by the previous provisions ceased to be shareholders, from being called on to pay.

It is contended, that the definite article in this exception, *the* deceased, and *the* bankrupt, &c., means to designate *that* deceased whose executors, or *that* bankrupt whose assignees, have availed themselves of the power of substituting other shareholders in the place of the deceased or bankrupt; but this would be to add many words to the sentence, and the definite article is very intelligible and proper without such an addition: it means only the shareholders who die or become bankrupts, and nothing can be

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Feb. 7.

THE declaration stated that the plaintiff sued "The Guardians of the Poor of the West Ham Union" for money payable by the defendants to the plaintiff for work and labour done by the plaintiff for the defendants at their request.

Plea—Never indebted; upon which issue was joined.

At the trial, before *Martin*, B., at the London Sittings in last Michaelmas Term, it appeared that the West Ham Union, of which the defendants were guardians, consisted of the parishes of Walthamstow, Leyton, Woodford, and Wanstead; and that the plaintiff sought to recover the sum of 80*l.* 19*s.* 6*d.*, for poundage due to him on the collection of poor rates for the parish of Wanstead. The plaintiff was appointed collector of the poor rate for the West Ham Union under the following circumstances: On the 19th of August, 1836, the Poor Law Commissioners, in execution of the powers vested in them by the 4 & 5 Will. 4, c. 76, made the following order:—

"We hereby order and direct that the guardians of the West Ham Union shall, within one month from the date of this order, appoint one or more fit and proper person or persons to be the collector or collectors of the poor rates of such of the several parishes comprised therein as the said guardians may deem to require a collector; and shall, as

In August, 1836, the Poor Law Commissioners, by an order made under the 4 & 5 Will. 4, c. 76, directed the guardians of a certain union to appoint a collector of poor rate for the parishes comprised therein; and they also directed that he should be paid a certain poundage. Amongst other duties, he was required to pay the sums collected to the treasurer of the Union. In July, 1847, and after the passing of the 5 & 6 Will. 4, c. 69, which incorporated the guardians of the poor, the above-mentioned guardians, in pursuance of the above order, by a resolution

of the board, appointed the plaintiff collector of poor rates for the Union at the poundage prescribed, which appointment was afterwards sanctioned by the Poor Law Commissioners. The 4 & 5 Will. 4, c. 76, s. 46, enacts, that the salaries of collectors shall be chargeable upon and payable out of the poor rates, and shall be recoverable against the overseers and guardians by all such ways and means as the salaries of assistant overseers or other paid officers of any parish or union are recoverable by law. The plaintiff collected the rate until 1850, and from time to time paid the monies so collected to the treasurer of the Union without retaining his poundage, which was paid to him by all the parishes except one. The plaintiff having sued the guardians for the amount:—*Held*, that they were not liable; for, being a corporation, they could not bind themselves, except by a contract under seal: and, assuming that the appointment was valid, though not under seal, still the power to appoint to the office at a salary did not imply that the persons appointing should pay the salary, for the statute expressly made it chargeable on the poor rate.

Scmble, that the plaintiff might have deducted his poundage from the sums collected.

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soon as conveniently may be after such appointment, report the same to us the said Poor Law Commissioners, in order that we may approve or disallow the same, or give such other directions thereon as the case may require. And in case and so often as any person so appointed shall die or resign, or be removed, the said board of guardians shall, as soon as conveniently may be after such death, resignation, or removal, proceed in like manner to a new appointment.

“And we do hereby further order and direct, that each of the said collectors shall be paid by the poundage following; (that is to say,) where the sum received by the collector from any one party at any one time exceeds 3*l*, the poundage on such sum shall be after a rate not exceeding four pence in the pound; but where the sum received from any one party at any one time shall be equal to or less than 3*l*, the poundage shall be after a rate not exceeding eight pence in the pound; and also by a poundage not exceeding ten per cent. on the money collected in repayments of money advanced, or of relief administered by way of loan, and on money received from the relatives of paupers either by attachment of wages or otherwise.

“And we do hereby further order and direct, that the fol-

(The order then directed that persons appointed should give security.)

"And we do hereby further order and direct, that the treasurer of the said Union shall receive all monies tendered to be paid to the churchwardens and overseers of any parish in the said Union for which a collector or collectors shall be appointed under this order, and shall place the monies so paid to the credit of such churchwardens and overseers.

"And that the said treasurer shall pay and satisfy, out of any monies for the time being in his hands on account of the churchwardens and overseers of any such parish as aforesaid, all cheques and drafts signed by the majority of the churchwardens and overseers of such parish.

"And we do hereby further order and declare, that the said monies so paid to the credit of the churchwardens and overseers of any such parish as aforesaid shall be applied to such and the same purposes as the same would by law have been applicable to in case the same had been collected by the churchwardens and overseers.

"Given under our hands and seals the 19th day of August, 1836.

"S. FRANKLAND LEWIS.

"J. G. SHAW LEFEVRE.

"GEO. NICHOLLS."

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At a meeting of the board of guardians of the West Ham Union, held on the 4th of June, 1847, the following minute was entered on the minute book:—

"The board proceeded to the election of a collector for the several parishes of Walthamstow, Leyton, Woodford, and Wanstead, in this Union, in the place of Mr. Thomas Barber, deceased, the guardians having been specially summoned for that purpose, pursuant to a resolution of the board on the 21st ult." (The minute then proceeded to state that several candidates appeared personally before the

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board, and that the majority of the votes of the guardians was in favour of Mr. Dorwood).

Whereupon Mr. David Dorwood was afterwards, on a shew of hands, unanimously declared duly elected and appointed as collector for the said parishes of Walthamstow, Leyton, Woodford, and Wanstead accordingly, to be paid by a poundage of 8*d.* in the pound for all sums of 3*l.* and under, and for all sums exceeding 3*l.* 4*d.* in the pound; also for a poundage not exceeding 10 per cent. on the money collected in repayments of money advanced, or of relief administered by way of loan, and on money recovered from the relatives of paupers either by attachment of wages or otherwise; in consideration of which he the said collector is to perform the several duties required of such officer by the rules and orders of the Poor Law Commission.

Resolved—"That the foregoing appointment be reported to the Poor Law Commissioners for their approval."

At a meeting of the board of guardians of the West Ham Union, held on the 9th of July, 1847, the following minute is entered in the minute book—

"This board proceeded to take into consideration a letter from Mr. Dorwood, collector, addressed to the board on

wood, who at his own request, by permission of this board, resigns the same.

"That Mr. Dorwood be re-appointed to his former office of relieving officer in the place of Mr. Smart; and that this resolution and minute of the said appointment be submitted to the Poor Law Commissioners for approval."

On the 10th of July, 1847, the board of guardians transmitted to the Poor Law Commissioners copies of the above minutes, and requested their sanction to the exchange of offices. After some correspondence, on the 30th of July, 1847, an assistant secretary of the Poor Law Commissioners wrote to the board of guardians a letter, containing the following passage: "I am to state that the Commissioners approve of the acceptance by the guardians of Mr. Smart's resignation of the office of relieving officer of the parishes of Walthamstow, Leyton, Woodford, and Wanstead; and the Commissioners sanction his appointment to the office of collector of poor rates for the above-mentioned parishes, at the poundage prescribed in the Commissioners' order of the 19th of August, 1836, as proposed by the guardians."

The plaintiff, having given the required security, proceeded to collect the poor rate from the above-mentioned parishes until the year 1850, when he resigned. From time to time he paid the monies collected by him to the treasurer of the Union, to the separate account of each parish, without retaining his poundage, and the poundage had been paid to him by all the parishes except that of Wanstead.

It was objected on behalf of the defendants, first, that the appointment of the plaintiff was invalid, it not having been made under seal; secondly, that the defendants could not be bound except by a contract under seal; thirdly, that the defendants were not the parties liable to pay the poundage. The learned Judge directed a verdict

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for the plaintiff, reserving leave to the defendants to move to enter a nonsuit.

Edwin James having obtained a rule nisi accordingly.

Bramwell and *Raymond* now shewed cause.—First, the appointment of the plaintiff was valid, though not under seal. The rule with respect to common law corporations does not apply to a statutory corporation of this kind. The 4 & 5 Will. 4, c. 76 s. 46, empowers the Poor Law Commissioners to direct overseers and guardians to appoint paid officers for superintending or assisting in the administration of the relief and employment of the poor. Under that provision the Commissioners in the year 1836 made the order in question. At that time the guardians were not a corporation. The case of *Regina v. The Poor Law Commissioners, Re Cambridge Union (a)*, afterwards decided, that, where the Commissioners form several parishes into a Union, but not for the purpose of rating, they have no power, under the 46th section of the 4 & 5 Will. 4, c. 76, to order the appointment of a collector of poor rates, since he is not an officer

ment by a resolution, there is nothing in the statute to disqualify them from so doing. In *Regina v. Greene* (a), it was objected that an appointment of this kind was a grant which the guardians should have made under seal; but the Court held, that, whether the collector was rightly elected or not, the allowance of his salary was valid, being made pursuant to an unrescinded order of the Commissioners. [Parke, B.—There the question was not, whether the guardians were liable to pay the money, but whether, having paid it, the sum ought to be allowed in the Union accounts]. The only sums which could be properly charged in account, were those which the guardians were liable to pay. But further, assuming that the rule of law applies to such a corporation, an appointment of this kind is within the exception. In Com. Dig. "Franchises" (F. 13), it is said, "But a corporation which has a head may give a personal command, and do small acts without deed; as it may retain a servant, a cook, butler," &c. The authorities there cited from Bro. Abr. Corporations et Capacities, 47, 49, 50, 56, are collected in a note to *Arnold v. The Mayor of Poole* (b). [Parke, B., referred to *The Governor and Company of Copper Mines v. Fox* (c)]. In *Clarke v. The Guardians of Cuckfield Union* (d), Wightman, J., says, "This relaxation of the rule has been gradually extended, and it may now be considered that the general rule, that a corporation aggregate cannot contract except by deed, admits of an exception in cases where the making of a certain description of contracts is necessary and incidental to the purpose for which the corporation was created." In *Sanders v. St. Neots Union* (e), it was held, that the guardians were liable in respect of iron gates supplied to the workhouse under their verbal order. Wherever the contract is binding as against the corporation, they are liable, because the

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(a) 17 Q. B. 793.

(d) 1 Bail C. C. 81.

(b) 4 M. & Gr. 876.

(e) 8 Q. B. 810.

(c) 16 Q. B. 229.

to appoint paid officers, and the guardians shall pay them. The act enacts, that the "salaries shall be payable out of the poor rates, and in such ways and means as the said guardians may think fit, not exceeding the salaries of other paid officers of any parish or parishes by law." [Alderson, B.—The act makes a rate.] The same object is attained in *Clarke v. The Guardians of the Poor*. Churchwardens have been held liable, though they had no parochial rate, in *Mills v. Rydon* (c). The plaintiff retained the amount of his salary, and directed by the order to pay it to the treasurer of the union.

Edwin James and Lushington v. *The Guardians of the Poor*, but were not called upon to pay.

PARKE, B.—I am of opinion that in these circumstances this action cannot be maintained. In the first place, there is no contract upon which the appointment is made; and if it depended on the construction of the act, it would be void.

the appointment was valid, still no action will lie against the guardians to recover the arrears of salary, unless the legislature has impliedly directed the salary to be paid by the guardians as a corporation. If the legislature so meant, an action of debt would lie on the Act of Parliament; for whenever a statute orders a sum of money to be paid, an action will lie upon the clause in the Act for its recovery. Therefore the question resolves itself into this, whether or not the Legislature meant that the guardians as a corporation should pay the salary. The 46th section of the 4 & 5 Will. 4. c. 76 does not say that the salary is to be paid by the guardians themselves, but that it shall be charged upon and paid out of the poor rate in the manner and proportions fixed by the Commissioners, and shall be recoverable against the overseers and guardians by all such ways and means as the salaries of assistant overseers or other paid officers of any parish or union are recoverable by law. That is not equivalent to saying that the salary is to be paid by the corporation of guardians. I will take this opportunity of observing that my Brother *Wightman*, in the case of *Clarke v. The Guardians of the Cuckfield Union* (a), seems to differ from the considered judgment of this Court in the case of *Lamprell v. The Bilericay Union* (b). But I do not think that the 4 & 5 Will. 4, c. 76, and 5 & 6 Will. 4, c. 69, authorised boards of guardians to bind themselves by contracts of that description except under seal. In the case of *Sanders v. The St. Neots Union* (c), I am reported to have overruled the objection, that the defendants could not contract except under seal; but that is not so. I allowed the case to proceed, because I thought the objection was apparent on the record.

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ALDERSON, B.—I am of the same opinion. The first

(a) 1 Bail C. C. 81.

(b) 3 Exch. 283.

(c) 8 Q. B. 810.

party to pay this salary, since it is chargeable upon and payable out of the poor rate of that parish. It is true, the statute says that it shall be recoverable against the guardians by such ways and means as the salaries of assistant overseers are recoverable; but assistant overseers are not appointed by the guardians, they are nominated by the vestry and afterwards appointed by two justices. That subject was considered by this Court in *Holland v. Lee* (a). I am clearly of opinion that in this case the guardians are not liable.

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Rule absolute.

(a) 9 Exch. 430.

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Feb. 8. EDWARD DOD, Administrator of EDWARD DOD, deceased,
v. RALPH DOD and WILLIAM DOD, Executors of RALPH
DOD, deceased.

By indenture, between the executors of E. D. of the one part, and R. D. of the other part, reciting, that the testator, by his will (after certain bequests), gave the residue of his personal estate equally amongst his children, and also directed that his daughter M. should only receive 500*l.* of her share at the age of twenty-one, and that his executors

should place out the remainder at interest, to be paid her during her life, and, after her death, such remaining principal to be equally divided amongst her children; and, in case of her death without issue, amongst such of the testator's children as should be then living: that E., one of the executors, purchased a farm, which he conveyed to R. D., in consideration of 2000*l.*; that there was in the hands of the executors 1620*l.*, of which 400*l.* was in trust for M.; and that the executors had agreed with R. D., that the said sum of 1600*l.* should be received by him and applied towards the payment of the purchase-money of 2000*l.* for the said estate, and should remain in his hands, with interest at 4*l.* 10*s.* per cent.; and that R. D. should also be chargeable with such principal money from time to time as might become payable, agreeably to the will of the testator: It was witnessed, that, in consideration of the said sum of 1600*l.* trust money, so by these presents lent to R. D. as aforesaid, R. D. covenanted with the executors to pay them, for the use of the testator's children, interest for their respective shares at the rate of 4*l.* 10*s.* per cent.; and also to pay such principal money as might become payable, from time to time, agreeably to the recited will. Then followed a power to receive the rents or sell the premises on default in payment of the interest or principal; also a covenant by R. D. to pay the interest and principal to the executors for the use of the testator's children; and a covenant by the executors, that R. D. might, on payment of interest, retain in his hands the said sum of 1600*l.*, agreeably to the will of his late father. All the other children of the testator died in the lifetime of his daughter M., who died without issue. The administrator of the surviving executor having brought an action against the executor of R. D. to recover the 400*l.*:—*Held*, that this was money lent, which the defendant was bound to pay to the plaintiff, and not to the administrator *de bonis non* of the original testator.

THIS was an action by the plaintiff, as administrator cum testamento annexo of Edward Dod, of Calveley, against the defendants, as executors of Ralph Dod, of Chorley.—The declaration stated, that by an indenture, made the 28th of March, 1795, between Elizabeth Dod, widow, and John Dod, of Chorley, and Edward Dod, of Calveley (executrix and executors of Edward Dod, deceased, late of Chorley), of the one part, and Ralph Dod, of Chorley, of the other part, reciting that the said Edward Dod, of Chorley, by his last will, dated the 2nd of January, 1786, after making certain bequests, gave all the rest and residue of his personal estate, money, and debts to him owing, equally amongst his several children, John, Edward, Ann, Samuel, Ralph, Richard, and Mary: he also directed that his daughter Mary should only receive 500*l.*, part of her share of his personal estate, when she arrived at the age of twenty-one

years or day of marriage; and did further direct that his executrix and executors should place out at interest the whole of Mary's share, and continue the same at interest during her minority, and the remainder of her share to continue at interest, to be paid her during her life; and after her death, he directed such remaining principal money to be equally divided among her children when his executors and executrix should think fit; and in case of her dying without leaving lawful issue, the remainder of her share to be equally divided amongst such of his children as should be then living, &c.: that the said testator, Edward Dod, died without having altered or revoked his will; that afterwards the said Edward Dod (party thereto), one of the executors of his father Edward Dod, purchased a farm, which he conveyed to the said Ralph Dod, his heirs and assigns, or in trust for him or them, for the consideration of 2000*l.*: that Ann Dod married S. Harrison, and that Mary Dod married G. Reade, and had then received their then distributive shares of their respective legacies, so payable under the will: and that there appears to be now in the hands of the said executrix and executors the full sum of 1620*l.*, viz. 900*l.* in trust for Richard Dod, 320*l.* in trust for Ann Harrison, and 400*l.* in trust for Mary Reade; and that the said Elizabeth Dod, John Dod, and Edward Dod, the executrix and executors as aforesaid, have consented and agreed, to and with the said Ralph Dod, that the said sum of 1620*l.*, the undivided shares of the said Richard Dod, Ann Harrison, and Mary Reade, shall be received by him the said Ralph Dod, and be applied by him towards the payment of the said purchase money of 2000*l.* for the said estate, and shall remain in his hands, with interest, payable after the rate of 4*l.* 10*s.* per cent. to the said executrix and executors, or to the said Richard Dod, Ann Harrison, and Mary Reade; and that the said Ralph Dod shall also be chargeable with such principal money or monies, from time to time, as may become payable *agreeably to the will of the*

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said testator, all interest for the said principal sums having been paid to the day of the date hereof.—The indenture then witnessed, that for and in consideration of the said sum of 1620*l.* trust money so by these presents *lent* to the said Ralph Dod as aforesaid, he the said Ralph Dod, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree, to and with the said Elizabeth Dod, John Dod, and Edward Dod, executrix and executors as aforesaid, that he the said Ralph Dod, his heirs, executors, administrators, or assigns, shall pay unto the said executrix and executors, or the survivors of them, for the use of the said Richard Dod, and to the said Ann Harrison and Mary Reade interest for their respective shares at the rate of 4*l.* 10*s.* per cent. per annum; and also shall and will pay such principal money or monies as may become due and payable, from time to time, *agreeably to the said recited will*.—Then followed a proviso, that on default in payment of the interest or principal in six months after demand, the executrix and executors might receive the rents, or sell any part of the premises that would pay the interest and principal.—The indenture also contained a covenant by Ralph Dod for payment to the said executrix and executors of the interest and principal for the use of the said Richard Dod, Ann

which she was to receive at the age of twenty-one, or on her marriage; and that all the other children of Edward Dod, of Chorley, died in the lifetime of the said Mary, who was his daughter, and who died without leaving issue; and that, in the events aforesaid, the said 400*l.* was not, upon the death of the said Mary, bequeathed or disposed of by the said Edward Dod, of Chorley, and the same, within the meaning of the covenant in the said indenture, became, upon the death of the said Mary, payable to and amongst divers persons, and a reasonable time for the payment thereof elapsed after the death of Mary and before the suit.—The declaration then alleged as a breach, the non-payment of the principal sum of 400*l.* by the said Ralph Dod, or his heirs, executors, administrators, or assigns.

Demurrer and joinder.

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Hugh Hill (*Simpson* with him) in support of the demurrer (Jan. 24).—The questions are, first, whether the defendants, as executors of Ralph Dod, are under this deed liable to pay the principal sum of 400*l.*; and if so, secondly, whether they are liable to pay it to the plaintiff. Those questions depend entirely on the construction of the contract entered into by Ralph Dod. By that contract he is to retain the principal money on payment of interest; but he is to become chargeable with such principal money as may become payable, agreeably to the will of the original testator. Now Mary Reade died without issue, having survived all her brothers and sisters. The will, therefore, does not provide for the application of this money. It is a lapsed legacy, and the law gives it to the next of kin of the original testator. Therefore, assuming that the defendants are liable to pay this 400*l.*, they are only liable to pay it to a party claiming as administrator de bonis non of the original testator. [*Alderson*, B.—How can the principal be paid agreeably to the will, when the will does not provide for its



the testator's next of kin. [*Alderson*, B.—The covenant is, to pay the money to the persons entitled to it under the will. An administrator de bonis non does not take under the will; he takes because there is no specific bequest.—*Parke*, B.—If the transaction amounts to a loan, there are ample words to shew that the money is to be repaid to the person who lent it.] According to the true construction of the deed, the defendants' testator was bound to pay the money to the administrator de bonis non as soon as he was appointed.

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PARKE, B.—The plaintiff is entitled to judgment. It is perfectly clear that this is a loan of money, with an agreement to repay it to the person who lent it.

ALDERSON, B.—The plaintiff is responsible to the administrator de bonis non, and it would, therefore, be strange if he were not entitled to receive it.

PLATT, B., and *MARTIN*, B., concurred.

Judgment for the plaintiff.

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Feb. 13. THE ATTORNEY-GENERAL OF THE PRINCE OF WALES v.
THE BRISTOL WATERWORKS COMPANY.

"The Bristol Waterworks Act, 1846," (9 & 10 Vict. c. ccxxii.) enables the company to take the water of the river Chew, subject to certain conditions. In 1849, their works were completed, and they used the water of the river. In 1853, the 16 Vict. c. vii. passed, the 15th section of which provides, that "nothing contained in that Act, or in

INFORMATION.—The count stated, that, at the several times of the committing of the grievances, &c., his Royal Highness the Prince of Wales was seised in his demesne as of fee, in right of his Duchy of Cornwall, of and in certain closes of land, with the appurtenances, situate in the county of Somerset; and his Royal Highness the Prince, before and at the said several times, of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a certain stream or watercourse there, called the River Chew, which had been used to run and flow, and during all the time aforesaid of right ought to have run and flowed, and still of right ought to run and flow, unto and into, through, over, and contiguous to the said closes of land for the fertilising and improvement of the soil of the said closes, and for the irrigating and watering thereof, and for other useful purposes.—The count then alleged that the Bristol Waterworks Company after

of land, to wit, by drawing off the same at a point higher up the said stream or watercourse than the said closes, by means of certain, to wit, twenty pipes, cuts, channels, sluices, and aqueducts, unto and into certain, to wit, ten basins and reservoirs of great depth and length, to wit, &c., and thereby, at each of the several times aforesaid, prevented and hindered the water of the said stream or watercourse from running and flowing in so ample and beneficial a manner as it ought, and otherwise would have done, unto and into, through, over, and contiguous to the said closes of land, for the fertilisation and improvement of the soil, &c.

Plea.—That his Royal Highness the Prince of Wales ought not, before and at the several times in the said count in that behalf mentioned, of right to have had and enjoyed, nor still of right ought to have and enjoy, the benefit and advantage of the water of the said River Chew; nor had the same been used to run and flow, nor during all the time aforesaid of right ought to have run and flowed, nor still of right ought to run and flow, unto or into, through, over, or contiguous to the said closes of land, in the said count mentioned, for the fertilising and improvement of the soil of the said closes, or for the irrigating and watering thereof, or for other useful purposes, as in the said count is alleged: concluding to the country.—Upon which issue was joined.

At the trial, before *Wightman, J.*, at the last Somerset Assizes, it appeared that the Prince of Wales was seised in fee, in right of the Duchy of Cornwall, of the manors of Widcombe and West Harptree in Somersetshire, through which the River Chew flows. The defendants were incorporated by the 9 & 10 Vict. c. ccxxii. for the purpose of supplying the city of Bristol with water. That Act empowered them to take the water of the River Chew, on complying with certain conditions(*a*). Their works were completed in 1849, and a sum of money was paid by them to

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(*a*) Sect. 29. "Provided also, that before the company shall divert, de-
tain, take, or use for the purpose of supplying the works of the company any of the

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the Duke for permission to carry their pipes through his land. After the works of the company had come into operation, a claim was made on behalf of the Duke for

waters of the said river Chew, or of the springs and streams tributary thereto, they shall at their own expense make, construct, and completely finish at the places defined upon the plan three reservoirs, capable of containing together not less than twenty-four million cubic feet of water, for the purpose of providing a supply of water for the mills and works on the said river Chew and the branches thereof, and also shall make and construct all such dams, cuts, channels, byewashes, weirs, sluices, gauges, and other works as may be necessary for conveying the said waters into and filling the said reservoirs, and for measuring, drawing off, and emptying the same for the use of the said mills and works: and the com-

to divert or take or in any manner interfere with the water flowing or passing, or which but for the powers of this Act might flow or pass, into the said river Chew, unless and until water, after the rate of twelve cubic feet per second, for twelve hours of each and every day, shall be passing down the said river from and out of the said reservoirs for the use of the occupiers of the several mills and works on or near the same; and in order better to ascertain the actual quantity of water from time to time passing down the said river from and out of the said reservoirs, proper weirs, gauges, and other necessary works shall be set up under the superintendence and control of two engineers, one to be appointed by

compensation for the loss of the means of irrigating the Duchy lands, by reason of the abstraction by the company of the water of the River Chew. In 1853, the 16 Vict. c. vii. passed, to enable the company to raise an additional sum by loan, and to amend the former Act. This Act was opposed by the officers of the Duchy, and at their instance the 15th section (a) was inserted. After the passing of that Act, the defendants continued to take the water as they had before done. It was proved on the part of the Duke that the defendants' use of the water deprived him of the

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set that the said three reservoirs and works are duly made and completed, shall for all purposes whatever be conclusive evidence thereof; provided always, that such two justices of the peace may, at the expense of the said company in all things, call in and employ an engineer to aid and assist them in deciding and determining upon the application of the said company for such certificate, and also upon such disputes and differences as aforesaid."

Sect. 32. "Provided always, and be it enacted, that, until it shall be proved to the satisfaction of such two justices, and shall be so certified by a declaration in writing under their hands, that the said three compensation reservoirs have been completely finished and filled with water, and rendered capable of retaining and discharging such water, it shall not be lawful for the company in any manner to appropriate or divert the river Chew, or any springs or streams, or any parts thereof; and all expenses attending the reference to such justices shall be borne and paid by the said company,

unless the said justices shall otherwise order."

(a) Sect. 15. "Nothing contained in this Act, or in 'The Bristol Waterworks Act, 1846,' or the other Acts herein recited or referred to, shall extend to authorise the company to purchase, take, use, or interfere with the land, soil, or water, or any rights in respect thereof, belonging to her Majesty in right of the Duchy of Cornwall, without the consent in writing of two or more of the principal officers of the said Duchy, and which consent such principal officers, or any two of them, are hereby authorised and empowered to give, or belonging to the Duke of Cornwall for the time being, without the consent of the said Duke, testified in writing under the privy seal of the said Duke first had and obtained for that purpose, or to prejudice, diminish, alter, or take away any of the rights, profits, privileges, powers, or authorities vested in or enjoyed by her Majesty, her heirs, or successors, in right of the Duchy of Cornwall, or in or by the Duke of Cornwall for the time being."

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means of irrigating his land. The defendants relied on the 9 & 10 Vict. c. ccxxii., and a certificate of the justices, under the 31st sect., that the reservoirs and works were duly made. On the other hand it was insisted, that the defendants had not complied with the conditions imposed by the 30th section.

It was objected on the part of the Duke, first, that, upon the issue raised by the plea, the defendants could not avail themselves of the provisions of the 9 & 10 Vict. c. ccxxii.; secondly, that the defendants were bound to prove, as a condition precedent to their right to take the water, that they had complied with the requisites of the 30th section; thirdly, that the 15th section of the 16 Vict. c. vii. had a retrospective operation, and prevented them from interfering with the water belonging to the Duke without his consent. The learned Judge directed a verdict for the plaintiff, reserving leave to the defendants to move to enter a verdict for them.

Butt, in the following Term, obtained a rule nisi accordingly; against which

Alexander, Montague Smith, and Maynard shewed cause (Nov. 24).—First, upon these pleadings the defendants were not at liberty to give in evidence the Act of the 9 & 10 Vict. c. ccxxii. If they had specially pleaded the powers conferred by this Act, the Attorney-General might have replied, that they had not complied with the conditions required by the 30th section. Secondly, assuming that the Act might be given in evidence, the Defendants were bound to prove that they had performed all conditions precedent to the exercise of the powers conferred by it. They have only a right to take water from the river, subject to certain restrictions; but it was not shewn that they had complied with the requisites of the 30th section. Thirdly, the 15th section of the 16 Vict. c. vii. is retrospective in its operation, and prevents the defendants from interfering with any water belonging to the Duke of Cornwall without his consent.

The introduction of the words "or in the Bristol Waterworks Act, 1846," shews the intention of the Legislature that the enactment should be retrospective. That Act did not give the Defendants an absolute right to the water, but only enabled them to take it *de die in diem*. It being, therefore, a right in the nature of a continuous exercise, the power to use it under the first Act ceased on the passing of the second.

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The Court then called on

Butt and Collier to support the rule.—The defendants proved all that was necessary to establish their right to the water. According to the argument on the other side, they would be bound to prove that the quantity of water mentioned in the 30th section flowed every day from the year 1848 until 1853. The certificate of the justices, under the 31st section, was evidence for the jury that the provisions of the 30th had been complied with. [*Parke, B.*—By the Act of 1846, the Defendants acquired no vested right to the water; they could only take it provided they supplied a sufficiency for the mills. Then the Act of 1853 absolutely prohibits them from interfering with any water of the Duke of Cornwall, either under the Act of 1846 or that Act, without his consent.] The meaning of that enactment is, that the defendants shall not acquire any fresh right to the water in question. It could never have been the intention of the legislature to deprive them of a right which they had already purchased. [*Parke, B.*—Suppose the legislature meant to prevent them from interfering with the water without the consent of the Duke, what other words would they have used?] They might have said, that the company should not "continue to use" the water as they had heretofore done. The words "take" and "interfere with" imply some new act. The 15th section of the last Act is capable of a reasonable construction, without interpreting

agreed. (His Lordship the
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the Defendants insist, is so
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Act obtained by the Compa
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They could not have obtain

the water without first obtaining the consent of the Duke of Cornwall under his privy seal. It is to be presumed, that the Duke or his advisers, in protecting his rights, will act in a reasonable manner, and will not impose on the company any improper conditions; but that must be left to their discretion. It was a matter in dispute, whether the conditions imposed by the former Act had been complied with, and we must presume that the Legislature, in giving additional powers to the company, intended to prevent all possibility of dispute, by leaving the matter entirely in the discretion of the Duke or his advisers. We are therefore of opinion that the rule must be discharged.

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Rule discharged.

ROSS v. GREEN.

Feb. 5.

IN this case, a writ of summons issued on the 14th of March, 1849, and on the same day the defendant's attorney gave an undertaking to appear. On the 10th of April, 1849, and before declaration, the defendant obtained an order upon the plaintiff for security for costs, he being at that time resident in Canada. That order remained un-complied with until the 19th of December, 1854, when the plaintiff applied to a judge to rescind the order, on the ground that he had returned to, and intended to reside in, this country. The order was rescinded, and on the 1st of January, 1855, the plaintiff delivered a declaration.

The Reg. Gen., Hil. Term, 2 Will. 4, r. 35, (repealed and re-enacted in terms by the 15 & 16 Vict. c. 76, s. 58), which provides, that "a plaintiff shall be deemed out of Court unless he declare within one year after the writ of summons is returnable," does not apply to the case of proceedings stayed for more than a year by an order for security for costs.

Maynard had obtained a rule nisi to set aside the declaration on the ground that the plaintiff was out of Court, he not having declared within a year after the writ of summons was returnable.

But if the security be

given at any time within the year, the plaintiff must declare before its expiration.

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Aspland shewed cause (Jan. 27).—First, under the circumstances of this case, there was no period from which the year would begin to run. By Reg. Gen. Hil. Term, 2 Will. 4, r. 35, “a plaintiff shall be deemed out of Court unless he declare within one year after the process is returnable.” The process is returnable on the day when it is served on the defendant. Here there has been no actual service. [*Martin*, B.—The undertaking to appear must be considered for this purpose as actual service. *Parke*, B.—*Primâ facie*, the defendant ought to have appeared within a year after his undertaking.] Secondly, the application should have been to rescind the order of the 19th of December, which released the plaintiff from the obligation to give security for costs. That is an order made in the suit, and being in force, it shews that the suit is existing. [*Alderson*, B.—The only question is, as to the meaning of the rule. Does it mean that a plaintiff shall be deemed out of Court if he does not declare within the year, although he had no power to do so? It is possible that he may not be able to give security for costs, and if so, how is he in default?] There is no rule applicable to the particular circumstances of this case. The Reg. Gen. Hil. Term, 2 Will. 4, r. 35, is repealed by the Reg. Gen. Hil. Term, 1853, and its provisions are re-enacted by the 15 & 16 Vict. c. 76, s. 58. It is true that the latter rule has the words “save and except as regards any step or proceeding heretofore taken;” but that means an actual step or proceeding, not a default. Assuming, however, that the rule is in force, this is not a case within it. The rule only applies where a plaintiff, being at liberty to declare, omits to do so, and not where he is prevented from declaring by the act of the defendant. It is not like the case of a plaintiff refusing to deliver particulars of demand. Here, the plaintiff may have been unable, from poverty, to give security for costs; and the effect of holding that he is out of Court, may be to cause the Statute of Limitations to bar his claim. In

Minchiner v. Martin (a), *Jervis*, C. J., and *Maule*, J., expressed an opinion that the rule as to a term's notice did not apply where a plaintiff was disabled from proceeding by an order for security for costs. In *Unite v. Humphrey* (b), the plaintiff did not declare until more than a twelvemonth after the expiration of the rule which stayed the proceedings.—He also referred to *Kelly v. Brown* (c), *Tussie v. Kennedy* (d).

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v.
GREEN.

Maynard, in support of the rule.—The Reg. Gen. Hil. Term, 2 Will. 4, r. 35, was made under the authority of the 11 Geo. 4. & 1 Will. 4, c. 70, s. 11, and has the force of an Act of Parliament. It imposed a statutory limitation on the right of a plaintiff to declare, and limited the time to twelve months after the process is returnable. No disability will excuse a non-compliance with that rule. The year within which the plaintiff must declare is to be computed, not from the time of the defendant's appearance, but from the return of the writ: *Barnes v. Jackson* (e). In *Doe d. Vernon v. Roe* (f), it was held, that in an action of ejectment the rule as to a term's notice applied where the proceedings were stayed by an order on the plaintiff to deliver particulars of the premises. [*Alderson*, B.—There, the default arose from the plaintiff not doing an act which it was competent for him to have done. Here, it is the plaintiff's misfortune not to be able to give security for costs. The judge, when he makes the order, does not consider whether the plaintiff is able to give security; but, in the other case, the judge is satisfied that the plaintiff can give particulars of his demand. *Parke*, B.—The particulars are in the nature of a declaration: the plaintiff is called upon to complete the statement of his cause of action, therefore that case stands on a different footing.] In

(a) 12 C. B. 455.

(b) 3 Dowl. P. C. 532.

(c) 5 Dowl. P. C. 264.

(d) 5 D. & L. 587.

(e) 3 Dowl. P. C. 404.

(f) 7 A. & E. 14.

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Minchiner v. Martin (a), *Cresswell, J.*, refers to *Doe d. Vernon v. Roe*, and says, "By analogy to that case, the plaintiff here might have given security for costs at any time, without giving a term's notice, and might also apply to rescind the order for security, though he could not take any other step." [*Alderson, B.*—The defendant prevents the plaintiff from proceeding, then why is he to be deemed out of Court because he has not gone on? If it were so, no foreigner could sue unless he came to this country.] It is in the power of the plaintiff to remove the obstacle. If a different rule be established, it will be competent for a plaintiff to proceed after a lapse of any number of years. The object of the defendant in obtaining the order is not to stay the proceedings, but only to compel the plaintiff to proceed according to law.

Cur. adv. vult.

PARKE, B., now said.—In this case the Court think that there is no wilful default on the part of the plaintiff. It may be that he was incapable of finding security for costs, and if for want of that security he could not declare, he was not in default on that account. Striking out, therefore,

act of the defendant; consequently the case does not fall within the same principle as the former. The rule must therefore be discharged.

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ALDERSON, B.—We all think that the case would have been different, if the security for costs was given in the course of the year which had already begun to run. For instance, if the security was given six months after the service of the writ, then the plaintiff must declare within the following six months, or he would be deemed out of Court.

Rule discharged.

PHELPS v. ST. JOHN, Clerk.

Feb. 13.

W. H. COOKE, in last Michaelmas Term (Nov. 11), had obtained a rule calling on the Bishop of Salisbury to shew cause why he should not forthwith return into this Court the writ of fieri facias de bonis ecclesiasticis issued in this cause in the year 1840, upon the benefice of the rectory of Marston, in the county of Dorset; and why he should not at the same time file with the said writ an account of all monies levied by him in obedience to such writ.

In the year 1836, the archdeaconry of Dorset was, by order in council, dissevered from the diocese of Bristol, and annexed to the diocese of Salisbury.—After the annexation, S., who had been registrar of the Bishop of Bristol, continued to act

Montague Smith in last Term (a) shewed cause; and

as registrar under the Bishop of Salisbury. In the year 1840, a writ of sequestration against the rector of a parish within the archdeaconry was directed to the then Bishop of Salisbury, and delivered to S. Sequestrators were appointed under the seal of the bishop, and the writ remained in the office of S. That Bishop of Salisbury having died, and a new bishop having been appointed,—*Held*, first, that the succeeding bishop was bound to return the writ directed to his predecessor. Secondly, that, although the writ, if directed to the Bishop of Bristol, might have been valid by the 6 & 7 Will. 4, c. 77, s. 20, yet that, under the above circumstances, it was too late to object to the form of the writ.

Semble, that the 10 & 11 Vict. c. 98, which provides for the saving of the powers of the Ecclesiastical Courts, does not apply to the act of issuing a sequestration upon a fieri facias de bonis ecclesiasticis, by a bishop, in which he acts as ecclesiastical sheriff.

(a) Jan. 13 and 16, before *Pollock*, C. B., *Purke*, B., *Alderson*, B., and *Martin*, B.



nected with the sequestration of livings within the Archdeaconry was transacted, and where writs of sequestration of such livings were delivered; and it is by no means clear, indeed, on the contrary, we think it may be collected from the affidavit made in answer to the application by Mr. M'Donald, the registrar of the diocese of Salisbury, and the secretary of the present bishop, that, in point of fact, after the annexation of the archdeaconry of Dorset to the diocese of Salisbury, Mr. Smith still continued to act as registrar, and to keep the office at Blandford, and that the business of the sequestrations of livings within the archdeaconry continued to be transacted there as before. In this affidavit, it is attempted to be shewn, that for certain purposes, and amongst them, that of sequestration, the archdeaconry continued to be within the diocese of Bristol until the 2nd of November, 1847; but we have no doubt that, in point of fact, the office at Blandford was continued by the then Bishop of Salisbury, and Mr. Smith was permitted by him to act. In this state of things, some time in the year 1840, the writ of sequestration of the plaintiff issued, directed to the Bishop of Salisbury. It was delivered to Mr. Smith, and accepted by him. Two sequestrators were appointed under the seal of the Bishop of Salisbury, and the writ is now in the office at Blandford, which seems to be continued up to the present time. There were a number of other writs of sequestration issued against the defendant and delivered at Blandford previous to the plaintiff's writ; and the Court of Queen's Bench, in Easter Term, 1849, at the instance of the plaintiff, made a rule absolute, that the late bishop of Salisbury should return all these writs. The defendant shortly afterwards obtained an injunction in the Court of Chancery, to restrain the plaintiffs from acting upon this rule, which continued up to the last year, and no return was ever made.

In Trinity Term last, an application was made to this

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succeeding bishop may be called upon to make a return of what has been levied since he came into office, and to return the writ: *Phillips v. Berkeley* (a).

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The second and main objection was, that the writ was wrongly directed, and that it should have been directed to the Bishop of Bristol. It would seem a great hardship upon the plaintiff if this objection was to prevail. The writ was directed to the Bishop of Salisbury after the living of the defendant was made part of and incorporated into the diocese of Salisbury. It was delivered to and received by the person to whom, and at the office where such writs were always delivered, and the appointment of the sequestrators was made under the official seal of the Bishop of Salisbury; but it is said that, notwithstanding this, the Bishop of Salisbury, whose predecessor had attorned, as it were, to this writ, is not bound to return it; and for this the case of *Powell v. Hibbert* was cited. This was an action for use and occupation brought by the vicar of a parish in Warwickshire. The defence was, that the vicarage was sequestered; to which it was answered, that the sequestration was void. The vicarage had been in the diocese of Lichfield and Coventry, but by an order in council, made before the sequestration, the part of the diocese in which the vicarage was had been transferred to the diocese of Worcester. The writ of sequestration had been issued, directed to the Bishop of Lichfield, and the sequestrators were appointed by him; and it was insisted, that, after the order in council came into effect, the writ should have been directed to the Bishop of Worcester, and that the writ directed to the Bishop of Lichfield, and everything done under it, was void. It was argued, on behalf of the plaintiff, that the 20th section of the above-mentioned statute (6 & 7 Will. 4, c. 77) operated to legalise the issuing of writs of sequestration to the bishop of the diocese in which the vicarage was before the alteration; but that at all events the statute

(a) 5 Dowl. P. C. 279.

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10 & 11 Vict. c. 98, s. 8, clearly rendered the writ of sequestration valid. All the Court were of opinion that such was the effect of this latter statute; and Lord *Campbell* and Mr. Justice *Erle* thought that the operation of the 20th section of the first-mentioned statute was as was contended on behalf of the plaintiff; but Mr. Justice *Patteson* and Mr. Justice *Coleridge* do not seem to have concurred; and they appear to have thought, that, after the alteration in the dioceses, writs of sequestrations ought properly to have been directed to the Bishop of Worcester, although they had no doubt that the operation of the statute 10 & 11 Vict. c. 98, cured the defect, if it was one.

This case by no means decided that a writ of sequestration directed to the Bishop of Worcester would have been bad, and it is really no authority that the writ in the present case directed to the Bishop of Salisbury was objectionable. It may be, that a writ directed to the Bishop of Bristol would have been good, but it does not follow that a writ directed to the Bishop of Salisbury is necessarily bad. We do not feel called on to express a decided opinion whether the view of Mr. Justice *Patteson* and Mr. Justice *Coleridge* in the above case be the correct one, though we are

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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

WEBSTER v. EMERY.

Feb. 6.

ERROR on the judgment of the Court of Exchequer for the plaintiff, in the case of *Emery v. Webster* (a). The declaration stated, that the defendant was possessed of the Adelphi and Haymarket Theatres, London, in which the defendant caused to be performed and acted plays, farces, &c., and the plaintiff was an actor and performer; and, thereupon, the plaintiff and defendant agreed with each other that the plaintiff should be engaged, and the plaintiff was by such agreement engaged, by the defendant to perform at the said Adelphi and Haymarket Theatres during the seasons 1851, 1851-2, and 1852-3, commencing on or about the 29th September in each year, at the salary of

To a declaration for a breach of contract in dismissing the plaintiff from his engagement as an actor, the defendant pleaded, in bar of the further maintenance of the action, that, after the plaintiff declared, the defendant pleaded payment into Court of 32*l.*, to which the plaintiff

replied by taking the money out of Court in satisfaction of his claim: that afterwards a Judge made an order, without the defendant's consent, that the replication and all subsequent proceedings should be set aside on payment of costs; and that the plaintiff should repay to the defendant the money taken out of Court, and be at liberty to amend his declaration and particulars of demand, the defendant being at liberty to plead *de novo*; that the defendant refused to receive the money and costs, and had not assented to the order; that the plaintiff amended his declaration and also his particulars by increasing his claim from 32*l.* to 216*l.* Replication: that the plaintiff replied and took the money out of Court, and taxed his costs under an erroneous and mistaken belief, that, notwithstanding he accepted the said sum of 32*l.* and costs, he would be entitled to proceed in a fresh action under the said agreement for the recovery of his salary when and as the same should from time to time become due, and that the order was made to enable him to rectify his mistake. On demurrer to the replication:—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that, as the Judge had jurisdiction to make the order, the Court could not inquire whether it was properly made, and therefore the plea was bad.

(a) The Court below gave judgment for the plaintiff without hearing any argument, being of opinion that the point was decided in *Emery v. Webster*, 9 Exch. 242.

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6*l.* per week for the season 1851, 7*l.* per week for the season 1851-2, and 8*l.* per week for the season 1852-3. Averments.—That the plaintiff accepted such engagement, and did perform thereunder, upon the terms thereof, at the said theatres or one of them, during the seasons 1851, 1851-2, and part of the season 1852-3, to wit, until 26th March, 1853, and has always since been ready and willing, and offered to continue to perform under the said engagement and upon the terms thereof during the remainder of the season 1852-3. Breach.—That the defendant, during the season of 1852-3, and before the expiration thereof, to wit, on the 26th May, 1853, wrongfully and without any cause whatsoever dismissed and discharged the plaintiff from the said engagement, and has always thence hitherto refused to suffer or permit the plaintiff to continue to perform, or to pay him the said salary.

Plea.—That the plaintiff ought not further to maintain his action, because the defendant says, that, after the plaintiff declared in this action, namely, on the 21st May, 1853, the defendant pleaded in this action according to the practice of this Court, and according to the form of the statute, &c., which plea was in the words following:—"In the Ex-

according to the practice of this Court, and according to the form of the statute, &c.; and the replication by which he so replied was in the words following:—"In the Exchequer of Pleas: The 24th May, 1853.—The plaintiff accepts and takes out of Court the sum of 32*l.*, in satisfaction of his claim in respect of the matter pleaded to; therefore, as to such matter, the plaintiff is satisfied, and he prays judgment for his costs and charges by him sustained." And the defendant says, that the plaintiff, in fact, did, as stated in the said replication, take the said sum of 32*l.* out of this Court in this action. And that thereupon, afterwards, the plaintiff, according to the practice of this Court, and according to the statute in such case made and provided, taxed his costs of suit in this action, which were thereupon by the defendant duly paid to the plaintiff within forty-eight hours after such taxation. That afterwards, and before the pleading of this plea, to wit, on the 6th day of June, 1853, Sir *James Parke*, one of the Barons of this Court, upon hearing, &c., of counsel for the plaintiff, and the attorney or agent for the defendant, made an order in this action, without the consent and against the will of the defendant or of his attorney or agent, and thereby ordered that the plaintiff's said replication herein, and all the plaintiff's subsequent proceedings thereon, should be set aside on payment of costs to be taxed, and that the plaintiff should repay to the defendant or to his attorney the said money so by the plaintiff taken out of Court, and also the costs so by the defendant paid; and that the plaintiff should be at liberty to amend the declaration and the particulars of demand in this action, the defendant being at liberty to plead *de novo*. And the defendant has always refused to receive the said costs and money in the said order specified, and has not received the same, or any part thereof, and has not in any way assented to the said order, or to the terms thereof, or any of them. That, under the said order, the plaintiff did afterwards amend the declaration and particulars of demand

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defendant makes this plea, and
case made and provided, with
which the declaration was so
says, that if he were now to
fact in the declaration, and is
plaintiff, the fact that he so p
aforesaid, would be evidence
defendant of the truth of th
such issue. And the defenc
particulars of demand, before an
than 32*l*.

Replication.—That the pl
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took out of this Court in this a
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received from the defendant t
such taxation, under an erron
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his salary under such agreeme
should thereafter from time to
under and by virtue of the saic
tiff, immediately upon his dis
error, and within a reasonabl
had so accepted the said sum

said error and mistake; and that, after the making of the order, the costs mentioned in the said order were duly taxed, and the plaintiff, after such taxation, and before the delivery of his amended declaration and particulars of demand, and within a reasonable time in that behalf, to wit, on &c., was then ready and willing, and then offered, to pay to the defendant the full amount of the costs of the order so found upon such taxation, as aforesaid, to be due and payable to the defendant, and also the sum of 32*l.*, so by the plaintiff taken out of this Court; and also the full amount of the costs so paid by the defendant, as in the said plea above mentioned; but that the defendant then wholly exonerated and discharged the plaintiff from formally producing and tendering the several sums of money last aforesaid, or any or either of them; and the defendant then wholly refused, and thence hitherto hath always wholly refused, to accept and receive the same of and from the plaintiff, although the plaintiff, from the day and year last aforesaid hitherto, always has been, and now still is, ready and willing to pay the same, and every part thereof, to the defendant.

Demurrer and joinder therein.

Bramwell (*Wordsworth* with him) argued in support of the demurrer (a).—The learned Judge had no power to order the amendment. By the declaration as originally framed, the plaintiff only intended to claim 32*l.* for four weeks salary, and if it had been competent for him to bring another action for the subsequent salary, the amendment need not have been made. [*Maule*, J.—The 222nd section of the Common Law Procedure Act, 1852, says that “all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made.”] The power to amend is limited to cases where a party makes a mistake

(a) Before *Coleridge*, J., *Maule*, *Erle*, J., *Williams*, J., *Crompton*, J., *Wightman*, J., *Cresswell*, J., J., and *Crowder*, J.

amend? Here the real question in controversy in the suit was damages for the breach of contract. *Maule, J.*—The Judge had to decide, as a matter in pais, what was the real question in controversy between the parties in that suit; we have not before us all the materials which were before him; then how can we say that he was wrong? Moreover, if the Judge had authority to make the order, the plaintiff should have applied to set aside the plea. Where a release is improperly given, the Court will not allow it to be pleaded.—He referred to *Wade v. Simeon* (a).

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H. Bullar appeared to argue for the defendant in error, but was not called upon.

COLERIDGE, J.—We are all of opinion that the judgment of the Court below ought to be affirmed. The only question is, as to the jurisdiction of the learned Judge to make the order. If he had jurisdiction, as we think he had, then whether he made it rightly or wrongly, it is not for this Court to interfere. We do not however mean to intimate that the learned Judge was wrong. The order having been made, effect must be given to it, and the plea affords no answer to the declaration as now constituted.

H. Bullar suggested, that, since the Common Law Procedure Act, 1852, the judgment should be *with costs*.

WIGHTMAN, J.—You are entitled to have them taxed as costs in the cause.

Judgment affirmed.

(a) 1 C. B. 610.

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an Act of Parliament, made and passed on the 27th of July, 1838, intituled "An Act for regulating the opening and working of mines and quarries in the forest of Dean and hundred of St. Briavels, in the county of Gloucester," the commissioners named in the said Act, having duly made and subscribed the declaration (thereby prescribed) and having taken such other proceedings as by the said Act are in that behalf required, did within three years from the passing of the said Act, that is to say, on the 8th of March, 1841, make their award in writing under their hands and seals, as directed by the said Act, and did thereby ascertain what persons, whether as free miners, or claiming through or under free miners, or as lessees of free miners, were, at the passing of the said Act, in possession of or entitled to gales for coal or iron mines within the said hundred, or stone quarries within the said forest, or of any pits, levels, or other works, made by virtue of gales for the purpose of working the coal and iron mines of the said hundred, or of any estate or interest therein; and did cause certain plans to be made, upon which the situations of the said gales, pits, levels, works, and quarries were delineated, so far as the same could be conveniently ascertained, part of such plans having reference to the Lowrey Vein hereinafter mentioned, and the rest thereof having respectively reference to the other veins mentioned in such award; and that the said commissioners also made a schedule or description of the said several gales, pits, levels, works, and quarries to accompany the said plans. And that the said commissioners did thereby ascertain and determine (amongst other things,) that John Griffiths, of &c., as a free miner, was in possession of or entitled to, for the purpose of working the coal, a certain gale in the said hundred of Saint Briavels, called "Prosper Free Level;" and that John Harris, of &c., as a free miner, was in possession of or entitled to, for the purpose aforesaid, a certain other gale, called "Harris' Pit," then forming part of a certain colliery, called "New Strip-and-at-it

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Colliery;" and further that the said J. Harris, a free miner, did after the 9th of April, 1832, and before the passing of the said Act, make applications in writing for the gales of coals which, at the time of the said award, formed part of "New Strip-and-at-it Colliery," but which applications were not granted; and that the said J. Harris had acted on such applications as if the same had been granted, and erected works and proceeded therein under such applications at considerable expense; and that the said commissioners did thereby award, sanction, and confirm the said gales therein-before mentioned, and which had been applied for as afore-said; and did also thereby award, ascertain, direct, and determine that the said gales, pits, levels, or works should be of the extent and bounded as shewn and described on the said plans and on the first schedule annexed to the award. And the plaintiff further gave in evidence, that the said schedule contained a description of the said gales, pits, levels, or works, called "The Prosper Free Colliery," as follows:—"Prosper Free Level Colliery.—All that tract of coal in the Lowrey Vein, bounded as follows, that is to say, commencing at the point where the said level struck the coal and extending in an eastward direction as deep as the said level will drain to the line of stones numbered 48 and 49, to be set up as the western boundary of the Collingwood colliery, and in the land up to the old workings:" And also contained a description of the said gales, pits, levels, or works, called "New Strip-and-at-it Colliery," including Harris' Pit Gale, in the words and figures following, so far as respects certain tracts of coal called Starkey Vein and Lowrey Vein: that is to say,— "New Strip-and-at-it Colliery," including Harris' Pit Gale.—And also all those other tracts of coal in the Lowrey and Starkey Veins, bounded as follows: that is to say, commencing at points where a continuation of the present cut-out from the said pit will strike the said Lowrey and Starkey Veins respectively, and extending from the said points in a westward direction as deep as

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levels from the said cut-out will drain to the line of the said boundary stones numbered 54 and 55, and extending from the same points in an eastern direction as deep as the said levels will drain to the line of the said boundary stones numbered 44 and 45, set up as the eastern boundary of the said colliery and the western boundary of Nelson Colliery, and extending in the land as to the Lowrey Vein throughout the whole length of such tract of coal to the Prosper Level, and as to the Starkey Vein in the land up to a straight line to be drawn, so as to pass through the old Strip-and-at-it Deep Pit and the Collingwood Land Pit, except that at the west and east ends of the said tract, and also adjoining the said Prosper Level, a barrier of coal twenty yards in width shall be left. And the plaintiffs proved that the last-mentioned gale, before the committing of the alleged trespasses, was assigned to and vested in the plaintiffs. And the plaintiffs also produced and proved one of the plans so made by the commissioners, being a plan having reference to the Lowrey Vein, upon which the Prosper Free Level Colliery and the New Strip-and-at-it Colliery, including Harris' Pit Gale, were respectively delineated by the commissioners, so far as the same, at the time of the making of the award, could be conveniently ascertained; and on such plan the coal of the last-mentioned colliery in the Lowrey Vein was described, and shewn as lying contiguous to and immediately adjoining the Prosper Free Level Colliery on the south thereof; and that, according to such delineation thereof upon the said plan, the coals which were proved to have been gotten by the defendant were not within or part of the Prosper Free Level Colliery, but were within and part of the New Strip-and-at-it Colliery, including Harris' Pit Gale. And the plaintiffs further gave in evidence, that, before and at the time of the passing of the said Act of Parliament, and at the time of the making of the award, there were various veins or seams of coal in the Forest of Dean and Hundred

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of St. Briavels, lying one under the other, known by different names, among which were the Lowrey Vein and the Starkey Vein, being the same as those mentioned in the said first schedule; and that the last-mentioned seams or veins of coal were towards the surface of the land in the said forest in a slanting or diagonal direction, and terminated in some cases at a few yards distance therefrom; and others appeared cropped out at such surface; and that any coal or colliery in any vein or seam of coal lying above any other coal or colliery in the same vein or seam, that is, higher up in the ascent or rise thereof, is said to be in the land of such other coal or colliery, and the lower of the two is said to be in the deep of the other; and that the New Strip-and-at-it Colliery, as respects the Lowrey Vein, was and is in the deep of the Prosper Free Level Colliery; and that one of the accustomed modes of winning and getting the coal in the said forest, when the surface of the ground was steep and hilly, was to make or drive an adit or excavation at the lower end of such surface through the earth until it met or struck the coal, and afterwards to carry on such adit or excavation in and through the coal itself, for the purpose of drawing the water from the mine. And the plaintiffs also adduced evidence to prove, that, at the time of the making of the award, the whole of such adit or excavation was called a level, and was a level according to the custom and understanding of miners in the Forest of Dean; and that the term "level" was not confined to that part of such adit or excavation between the surface of the earth and the point where the same struck the coal. And the defendant adduced evidence to prove the contrary thereof. And the plaintiffs proved, that, long before the making of the award, the colliery mentioned therein as the Prosper Free Level Colliery had been worked by J. Griffiths, or persons under whom he claimed, for many years, and that large quantities of coals had been gotten therefrom by them; that the coals gotten from such

colliery were not gotten through the said adit, level, or excavation, but were got by means of pits sunk from the surface upon the coal, to be gotten at intervals, as the work proceeded eastward, and that the colliery had been worked for a distance of about 2430 yards surface measurement, eastward from the point where the level first struck the coal. And the plaintiff then adduced evidence to shew, that, before and at the time of the making of the award, there was in such colliery, according to such custom and understanding of miners, as aforesaid, a level from the surface of the earth to a point where the same first struck the coal, and beyond that point extending eastward in the said colliery; and that the defendant had, after the making of the award, and before the commencement of this action, raised and got coals from the Lowrey Vein at a point beyond which the said level extended, but at a depth which could not be drained by such level; and the defendant adduced evidence to prove the contrary thereof; and the defendant then also proved that the colliery called Prosper Free Level Colliery had not been worked for nearly forty years prior to the making of the award; and that the same had become, and was, at the time of the making of the award, fallen in, so as to be inaccessible; and that no examination of the workings thereof was or could be made by the said commissioners, and that the delineation thereof upon the said plan was not made from any actual survey, inspection, or examination by any party whatsoever. But the plaintiff also proved, that the commissioners, before making the said plan, sought for and obtained information as to the Prosper Level Colliery, and the level and workings thereof, in order to enable them to make the said plan, and that they obtained such information from, amongst others, the said J. Griffiths, the then owner of the Prosper Free Level Colliery, and which J. Griffiths was proved to have worked therein before the working thereof was discontinued; and that the said plan

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any particular spot in the said forest and hundred, was to make and drive there an adit or excavation from the surface of the land towards and into the coal, for the purpose of draining and also sometimes of winning and getting the same; and that, according to the usage and practice of such free miners, such adit or excavation was driven in nearly a horizontal direction, but at such an inclination upwards as to allow water to run and flow from the mine along the same towards and unto the surface of the land; and that, by the usage and customs of the said forest and hundred, long before and at the time of the making of the award, every free miner who had obtained an unopened gale, and had for the purposes aforesaid so driven such an adit or excavation from the surface of the land to the coal thereof, was entitled to take all the coal which could be drained by an adit or excavation continued from the point where the adit or excavation so made from the surface first struck the coal; and that every such miner was also entitled, if he thought fit, in the first instance to get such parts of the said coal as lay nearer the surface of the land, called the land coal, and afterwards to proceed and get the deeper coal, provided such deeper coal was such as could be drained by such an adit or excavation as last aforesaid, and provided that in the meantime no other free miner of the said forest and hundred had claimed a right to get, and had commenced getting such deep coal as part of a gale claimed by him: and further, that when the Prosper Free Level Colliery had been and was first opened, an adit or excavation had been made and driven therein from the surface of the land in an horizontal direction, but at an inclination upward, along which water would drain till it struck the coal of the Lowrey Vein, for the purpose of draining the same, and that the same existed at the time of the making of the award; and that the coals so worked and gotten by the defendant as aforesaid were in the Lowrey Vein between the point where the said adit or excavation first struck the

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ing to the usage and custom of miners in the said forest, from the surface of the land to the point where it first struck the coal was, at the time of the making of the award, the level according to the custom and understanding of coal miners in the said forest and hundred, although the workings were afterwards continued from such point into and through the coal accompanied by a continuous drain to carry off the water; or, Secondly, whether the whole adit or excavation from the surface to the point where it struck the coal and beyond as far as the workings were carried into and through the coal accompanied by such continuous drain, was the level according to the custom and understanding of miners in the said forest and hundred at the time of the making the award; Thirdly, whether at such last-mentioned time there was in the Prosper Free Level Colliery a level beyond the point where the level first struck the coal, and extending eastwards beyond the point where the defendant got the coals, the subject of this action; and if there was, whether it would drain such last-mentioned coal. The learned Judge then told the jury, that, if they found the first question in the negative, and the second in the affirmative; and also if they found that, at the time of the making of the award, there was in the Prosper Free Level Colliery such a level as is mentioned in the third question, and that it would not drain the coal which the defendant had so gotten as aforesaid, they ought to find a verdict for the plaintiffs. Whereupon the defendant's counsel excepted to the ruling of the learned Judge, and insisted that, irrespective of the manner in which the jury should find and determine the said questions, he ought in point of law and upon the construction of the said first schedule and award to direct the jury that they should find their verdict for the defendant. The learned Judge then left the following further questions to the jury:—Whether, if, before the making of the award, a free miner having a gale in the said forest and hundred, worked upwards from

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the point where the adit or level from the surface first struck the coal, and got the higher or land coal first, was he or was he not, by the custom and usage of the said forest and hundred, entitled afterwards to drive another adit or level from the point where it so struck the coal so as to get the deeper coal; and also whether or not there were, at the time of the making of the said award, old workings in the land of the Prosper Free Level Colliery.

The jury found the first question in the negative; the second in the affirmative; and as to the third, that there was such level as in the question mentioned, but that it would not drain the coal got by the defendant; fourthly, that, under the circumstances in that question mentioned, a free miner was entitled to drive another adit or level from the point where it so struck the coal, so as to get the deeper coal, provided that in the meantime no other free miner had claimed to get or had commenced getting such last-mentioned coal as part of a gale claimed by him. The last question they found in the affirmative, and by the direction of the learned Judge gave a verdict for the plaintiff, with 175*l.* damages.

Phipson argued for the plaintiff in error (*a*) (Feb. 6.)—The plaintiff in error (the defendant below) is assignee of J. Griffiths, to whom the commissioners allotted the “Prosper Free Level Colliery;” and the question is, whether the coal which he took was within or without the deep boundary of that colliery. That depends on the construction of the award and schedule annexed to it. The colliery is thus described in the schedule:—“All that tract of coal in the Lowrey Vein bounded as follows, that is to say, commencing at the point where the said level struck the coal, and extending in an eastward direction as deep as the said level will drain to

(*a*) Before Coleridge, J., Maule, Erle, J., Williams, J., Crompton, J., Wightman, J., Cresswell, J., J., and Crowder, J.

the line of stones numbered 48 and 49, to be set up as the western boundary of the Collingwood Colliery, and in the land up to the old workings." The Lowrey Vein rises diagonally from south to north, where it is cropped out. The defendant in error (the plaintiff below) is the owner of the New Strip-and-at-it Colliery, which lies immediately below the "Prosper Free Level;" and it is conceded that the coal taken by the now plaintiff was in that colliery, if it was not in the "Prosper Free Level." Then, first, what is given by the award and schedule to J. Griffiths? The schedule professes to determine the boundaries of the "Prosper Free Level." It fixes the point of commencement at the west, where the level strikes the coal, and then it is to extend eastward as deep as the level will drain to certain stones, marking the western boundary of an adjoining colliery. Therefore the western and eastern boundaries are clear. The northern boundary is not in dispute, for it is where, by working upwards towards the surface of the land, the old workings are met with. The southern boundary is the only one as to which the parties differ. The plaintiff below contends, that the words "as deep as the *said* level will drain" refer to an existing level. The defendant submits that they only mean an imaginary line; and he relies on the custom of the free miners as proved (a). The award was made under the provisions of the 1 & 2 Vict. c. 43, "for regulating the opening and working of mines and quarries in the forest of Dean." That statute recites (*inter alia*), that certain privileges are claimed by certain persons to work the said mines and quarries, according to certain alleged usages and customs; that such usages are uncertain and undefined, and that it is expedient that they should be revised, altered, and amended, &c., and that due limits and boundaries should be assigned to such gales, pits, levels, and works as have

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(a) Ante, p. 915.

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been or may be hereafter opened. Therefore the object of that Act was to define or alter the customs, to empower the commissioners to grant gales with certain defined boundaries, and to regulate the rights of the miners. The 14th section describes the class of persons who are to be deemed free miners. By the 23rd section, such free miners have the exclusive right of having gales granted to them. The 24th section requires the commissioners, within three years from the passing of that Act, by their award in writing, to ascertain what persons, whether as free miners or as claiming through or under them, were at the passing of that Act in possession of or entitled to gales or quarries, or pits, levels, or other works made by virtue of gales; and to "cause a plan or plans to be made, upon which the situation of the gales, pits, levels, works, and quarries shall be delineated, so far as the same can be conveniently ascertained, or in such manner as may point out the general situation of such gales, pits, levels, works, and quarries." The 27th section also requires the commissioners, by their award, to allot and set out to each gale, pit, level, work, or quarry, definite metes and bounds, and to cause the same to be delineated or described in a plan or plans. The 31st section enacts, that, after the execution of the award, all the customs respecting the said mines, minerals, and quarries, other than such as are confirmed by the Act or award, shall cease. The 39th section provides for cases where, since the 9th of April, 1832, applications have been made by free miners for gales, and, although not granted, have been acted on as if granted; and the commissioners are required to determine which of such gales can be granted without injury or detriment to any legally existing gales, pits, levels, or works which have been granted previously to the 9th of April, 1832, or without injury to the legal or customary powers of parties possessed of or entitled to contiguous gales; and if so, the commissioners are empowered to

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award, sanction, and confirm the gales for which applications have been so made and acted on. The bill of exceptions finds that J. Griffith, as a free miner, was in possession of or entitled to, for the purpose of working the coal, the gale called "Prosper Free Level;" and that J. Harris, a free miner, did, after the 9th of April, 1832, and before the passing of the said Act, make applications in writing for the gales of coal, which at the time of the making of the award formed part of "New Strip-and-at-it Colliery," but which applications were not granted, and that J. Harris had acted on such applications as if the same had been granted, and erected works; and that the commissioners sanctioned and confirmed the gales which had been applied for, and awarded that the said gales, pits, levels, or works should be of the extent and bounded as shewn in the plans and schedule annexed to the award. The description on the plan excludes from the "Prosper Free Level" the coal which the defendant got, and therefore, if the plan is conclusive, the defendant has committed the trespass complained of. But the "Prosper Free Level" had been shut up for nearly forty years, and at the time of making the award it was inaccessible, and consequently the plan was not made from actual inspection of the colliery. There being a discrepancy between the award and the plan, the former must prevail. If the plaintiff's construction of the award is correct, the customary powers of J. Griffith would be interfered with. But the commissioners must be taken to have known and performed their duty. They could only sanction and confirm gales for which applications had been made and, though not granted, acted on, provided that no injury was thereby done to the customary powers of the owners of adjoining gales; the award ought, therefore, to be construed so as to be consistent with the duty of the commissioners. Their intention must be collected from what the Act has prescribed as their duty in connection with the language used in their award. The award should

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be solely looked at, and the plan rejected as a *falsa demonstratio*. The "said level" means the level from the surface to the point of contact—that is, where it first struck the coal; and the words "as deep as the said level will drain" mean "as deep as a level extending from the point of contact will drain." The passage should be thus read: extending *therefrom* in an eastward direction as deep as the said level *which first struck the coal* will drain. It was proved that the coals could be drained by an adit continued from that point in a horizontal direction to the eastward, at an inclination so as to allow water to flow along the same from the mine to that point, but that no such adit was made. The latter circumstance is immaterial, for the miner had a right to get the coal in any way he could, only he could not take it at a depth which could not be drained by that level. This view is confirmed by the description of the Strip-and-at-it Colliery.

Keating for the defendant in error.—There is no discrepancy between the schedule and the plan; if there be, it is conceded that the former must prevail. The commissioners, by their award, first determine that certain free miners are entitled to certain gales, and that these gales shall be of the extent and bounded as described in the plans and schedule. That is all that the plaintiff requires. The schedule contains a description of the extent and bounds of the two collieries in question. The plaintiff contends that the southern boundary of Prosper Level Colliery was the level *then existing*; the defendant says that the boundary is not a level but an imaginary line, along which the water might drain into some part of the existing level. That construction is at variance with the language of the schedule, by which the boundary is to commence "at the point where the *said level* struck the coal," and extend "in an eastward direction as deep as the *said level* will drain." That evidently means, as deep as the level now existing will

drain. One level only is spoken of, while two are necessary for the defendant's argument. In some instances the commissioners have used the word "levels." The defendant's construction will not satisfy the northern boundary of the Strip-and-at-it Colliery, which is described as extending "*to the Prosper Level.*" Could that have been meant to be a fluctuating, and not an existing, line? Moreover, a barrier of twenty yards of coal in width must be left. The commissioners could never have intended as a boundary that which would depend on the caprice of the miner. Seeing, then, that the plan agrees with the schedule, the construction is clear. The defendant had no right to interfere with the level as originally made by J. Griffith. The word "level" is a term of art, and may be explained, as here done, by evidence, to mean, not a particular portion, but the whole of the existing level.

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Phipson in reply.—The boundary line drawn on the plan is not at such a depth as a level would drain all the coal above it; and therefore, if the schedule means such a level, there is a discrepancy between the schedule and plan. The boundaries are those described in the plan and schedule, sect. 27. The 24th section shews how plans are to be made, and for what purpose, viz. "to point out the general situation" of the gales. The plan in question does that, and the award defines the metes and bounds. The 39th section affords a guide to the construction of the schedule. It must be assumed that J. Griffith was to have his gale with all the customary powers, and that the plaintiff took his subject to them. So construing the award, the plan is discrepant. The term "Prosper Level," in the description of the Strip-and-at-it Colliery, means the colliery. The plan is also at variance with this part of the schedule.

Cur. adv. vult.



be wholly rejected, (and we desire only to guard ourselves against an unqualified admission of it under all circumstances), because, upon consideration, we are all of opinion that, upon the true construction of the schedule alone, he has trespassed, and that upon that construction there is, in the present instance, no discrepancy between the two.

The language of the schedule is as follows :—" Prosper Free Level Colliery.—All that track of coal in the Lowrey Vein bounded as follows, that is to say, commencing at the point where the said level struck the coal, and extending in an eastward direction as deep as the said level will drain, to the line of stones numbered 48 and 49, to be set up as the western boundary of the Collingwood Colliery, and in the land up to the old workings." The dip of the coal is north and south, the north being the land side or that on which the vein cropped out. With this fact we have the boundaries complete : on the west, the point where an existing level had struck the coal ; on the east, the line of stones which were to form the western boundary of the Collingwood Colliery ; on the north, the old workings ; and on the south, such an extent as might be worked so that the level before spoken of would drain the water from the workings.

The question mainly argued was the meaning of the word "level." Now we think it clear that an existing level is here spoken of, which is probably called "the said level," with reference to the name of the said colliery immediately prefixed, Prosper Free Level Colliery. This level is spoken of as having struck the coal ; and as the track extends eastward, this level is made the measure of the southward workings or the workings in the deep, because they are to be carried no further than will admit of being drained by it. The obvious meaning of this provision is, that the level so described is to afford the outlet for all the waters of the colliery merely by gravitation ; *if its angle might be altered*, or if other drains might be made from other points

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Feb. 8.

IN January, 1854, the plaintiff and defendant agreed to state a special case for the opinion of this Court, under the 46th section of "The Common Law Procedure Act, 1852." A writ of summons was accordingly issued, and on the 23rd of October, 1854, a special case was prepared. On the same day the attornies for the plaintiff and defendant signed a consent for a Judge's order for the special case. On the 24th of October (the day on which "The Common Law Procedure Act, 1854," came into operation), the plaintiff's attorney, in pursuance of the above consent, drew up the Judge's order. The special case was dated the 24th of October, but was not in fact signed until the 27th. It contained no agreement that error should not be brought. The case was argued in the Court of Exchequer in last Michaelmas vacation (a); and error having been brought on the judgment of that Court,

In January, 1854, the plaintiff and defendant agreed to state a special case under the 46th section of "The Common Law Procedure Act, 1852." On the 23rd of October, 1854, their attornies signed a consent for a Judge's order for the special case; and on the following day (when "The Common Law Procedure Act, 1854," came into operation), the Judge's order was drawn up:—Held, that error might be brought on the special case, under the 32nd section of the last-mentioned Act.

Bovill moved to quash the proceedings in error (Feb. 5).—Under the circumstances of this case error will not lie. At the time the parties agreed to state the special case for the opinion of the Court of Exchequer, error could not have been brought upon the judgment; therefore it was an agreement that the question of law should be determined by that Court. By the 32nd section of "The Common Law Procedure Act, 1854," error may be brought upon a judgment upon a special case in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary. That enactment, however, does not apply to this case. In *Hughes v. Lumley* (b), where the parties agreed at the trial, which was before the passing of "The

(a) Ante, p. 496.

(b) 4 E. & B. 358.

to the contrary. In this case it may be taken for the purpose of the present question, that the parties had agreed to take the opinion of the Court upon a special case, and had also agreed to the question to be stated in it, on the 23rd of October last, and that all was complete except the obtaining of the order of a Judge. It was contended by Mr. *Bovill*, that, as the parties had done all that was necessary except the obtaining of the Judge's order before "The Common Law Procedure Act, 1854," came into operation, the 32nd section of that statute did not apply; and he cited *Hughes v. Lumley* (a). In that case a verdict had been found for the plaintiff, subject to a special case, by order of *Nisi Prius*, made before the 24th of October last, though the facts were not finally agreed on until after that time; and the Court considered that, as the special case was stated in pursuance of the agreement and order of *Nisi Prius*, made before the 24th of October, error could not be brought. This case, however, is distinguishable, inasmuch as the Judge's order, without which the special case could not be stated, was not obtained until after "The Common Law Procedure Act, 1854," came into operation; and both parties must be taken to have known (as the Act had passed two months before) at the time they agreed to obtain the Judge's order, that when the order was made error would lie on the judgment on the special case. There are three parties, whose concurrence is necessary for the purpose of stating a special case, viz. the plaintiff, the defendant, and the Judge; and as their concurrence did not take place until after "The Common Law Procedure Act, 1854," came into operation, it appears to the majority of the Court that the case falls within its provisions, and that, as there was no agreement to the contrary, error may be brought. The rule must therefore be refused.

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Rule refused.

(a) 4 E. & B. 358.

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STATUTE OF LIMITATIONS, (3).

ADMIRALTY COURT.

To an action for freight, the defendants pleaded in bar of the further maintenance of the action as to a certain sum, parcel of the money claimed, the hypothecation of the ship and freight by the master, a suit in the Admiralty Court by the obligee of the bottomry bond, a monition commanding the defendants on or before a day named to bring into the registry the money due for the freight to abide the judgment of the Court concerning the said bond, or to appear and shew good cause to the contrary, and further to do and to receive as unto law and justice should appertain; and that the defendants, being unable to shew any such cause, did, in obedience to the monition, after the commencement of the action, and were forced to, pay into the registry the said sum of money, to abide the judgment of the Court: —*Held*, on error, affirming the judgment of the Court below, that, as the Court of Admiralty has jurisdiction to decide all questions as to freight in such a case, the plea was good. *Place v. Potts*, 370

ADMISSION OF TITLE.*See* STATUTE OF LIMITATIONS, (4).**AFFIDAVITS.***See* MAGISTRATE, (1).

Where a summons was taken out before a Judge at Chambers for an order for the plaintiff's costs, on the ground that the case was one in which the superior Court had concurrent jurisdiction with the county court, and the Judge, on the facts, refused to make the order: upon a like application to the Court, affidavits in addition to those adduced at Chambers may be used. *Sanderson v. Procter*, 189

AGENT.*See* PRINCIPAL AND AGENT.**AGREEMENT.***See* CONSIDERATION.**APPEAL FROM JUDGE'S ORDER.***See* AFFIDAVITS.**APPEARANCE TO WRIT OF SUMMONS.***See* COMMON LAW PROCEDURE ACT, (1).**ARBITRATION.**

Several matters in difference existing between the plaintiff and defendants, some of which were the subject of an action, it was agreed between them, that, in consideration that the defendants would consent to refer to arbitration the matters of the action, the plaintiff would accept such agreement in satisfaction of all damages sustained by him in respect of the other matters:—*Held*, that the agreement and its performance

was a good bar to an action in respect of the last-mentioned matters. *Williams v. The London Commercial Exchange Company*, 569

ASSAULT.*See* MAGISTRATE, (1).**ASSISTANT OVERSEER.***See* BOND, (3).**ASSURANCE.***See* PASSENGERS ASSURANCE COMPANY.**ATTORNEY.***See* BAILIFF.

It is the duty of an attorney or solicitor, when duly called upon by his client to deliver to him the papers of which he has the charge, to deliver them in a reasonable condition. The question, whether the condition in which they are delivered is reasonable, is for the jury. *The North Western Railway Company v. Sharp*, 451

BAILIFF.

A bailiff may recover from the attorney in the cause the costs of executing a writ of ca. sa., although the bailiff was not specially nominated by the attorney. *Brewer v. Jones*, 655

BANK.

The plaintiff kept a deposit account at a joint-stock bank. The manager of the bank represented to him that the bank had an equitable mortgage on some houses of a third person, subject to a mortgage of 400*l.*, and advised him to purchase the houses for 595*l.*, 400*l.* to be paid in discharge of the mortgage, and 195*l.* to the bank. The plaintiff consented,

and took his deposit receipts to the manager at the bank, who, on presenting them to a clerk, obtained from him 595*l*. The manager then gave the plaintiff a receipt in his own name, stating, that 195*l*. was the balance of purchase-money of the houses, and that 400*l*. was deposited with him to pay off the mortgage. He afterwards absconded with the 595*l*. The plaintiff having brought an action against the bank to recover the money, the jury found that the manager intended to make the plaintiff believe, and the plaintiff did believe, that the manager was acting in this transaction as agent for the bank:—*Held*, that the bank was responsible for the money. *Thompson v. Bell*, 10

BANKRUPT.

(1). *Goods in the Order and Disposition of Bankrupt.*

Goods of a third party in the possession of a bankrupt at the time of his bankruptcy, do not pass to his assignees under the 125th sect. of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, unless the goods are in the bankrupt's possession under such circumstances as make him the reputed owner of them, and have also been left in his possession, order, and disposition by the consent and permission of the true owner improperly, under circumstances calculated to enable the trader to obtain false credit by the possession of the goods.

The question of reputed ownership, within the meaning of this section, is one purely of fact.

The plaintiff purchased some clocks of a London tradesman, who kept a shop, in which were exposed for sale clocks and watches. A portion of the tradesman's business was to clean and repair clocks, and such as were

sent to him for that purpose stood amongst those in the shop which were for sale. The plaintiff left the clocks which he had purchased with the tradesman, with directions that they were to be sent to him when they had been cleaned and put in order. The tradesman some time afterwards became bankrupt, the plaintiff's clocks still remaining in his shop. In an action by the plaintiff against the assignees for taking these clocks,—*Held*, that, under the circumstances, there was no evidence either that the bankrupt was the reputed owner of the goods, or that they were in his possession, order, or disposition, within the meaning of the above-named section; and consequently, that the goods did not pass to the assignees. *Hamilton v. Bell*, 545

(2). *Sale of Goods.*

A sale by a trader of his goods, at prices considerably below their market value, is not of itself a fraudulent transfer within the 67th section of the Bankrupt Act, 12 & 13 Vict. c. 106. To render the transaction fraudulent within that Act, the trader must have intended by such sale to defeat or delay his creditors, and the purchaser must have been aware of, or have had reasonable ground for suspecting, such intention.

A trader commenced business by obtaining a stock of goods on credit, and then, from time to time, sold a quantity of the goods to the defendant, another trader, at prices, in many instances, less than two-thirds of their real value. These transactions continued for several months, when the trader became bankrupt. It appeared that his bankruptcy proceeded entirely from these sales:—*Held*, that there was no evidence of an intention on the part of the

BANKRUPT.

(5). *Discharge of Shareholder from Liability for Calls.*

The defendant, a shareholder in a joint-stock company completely registered, became bankrupt and obtained his certificate. By the company's deed of settlement, the shareholders covenanted respectively, that they or their executors, administrators, or assigns, would pay, in manner thereafter directed, the amount of all calls required to be paid on their shares; and by one of the clauses of the deed, no assignees of a bankrupt or insolvent shareholder should be entitled to become shareholders in respect of any shares held by such bankrupt or insolvent; but, the assignees were to be entitled to sell the shares, upon leaving with the secretary the official copy of the documents necessary to establish the bankruptcy and the right of the assignees. By a subsequent clause, the directors of the company were empowered, when the circumstances should require it, to call upon all the shareholders, "other than the deceased or bankrupt or insolvent shareholders, their executors or administrators or assigns respectively," to pay up the calls made on their shares. By subsequent clauses, the directors were empowered, in case of the non-payment of calls by the shareholders, to declare such shares forfeited to the company and sell them; the rights of assignees to prior dividends being preserved to them, with leave also to the shareholders, whose shares should be so forfeited, to tender the amount of the calls before sale, &c., and to redeem the shares, and to be and become holders of the shares again. After the bankruptcy of the defendant, the directors made a call and sued him in respect thereof. The assignees did not take any steps to

BILL OF EXCHANGE 935

sell the shares:—*Held*, that, on the bankruptcy of the defendant, he ceased to be a shareholder liable to calls; and, consequently, that his bankruptcy was a good defence to the action for calls made subsequently thereto. *Wylam's Steam Fuel Company v. Street*, 849

BARRATRY.

Barratry can be committed by a master who is also part owner of the ship. *Jones v. Nicholson*, 28

BILL OF EXCHANGE.

See INFANT.

ISSUABLE PLEA.

PAYMENT.

PLEA, (2), (3).

(1). *Right to retain Bill.*

The plaintiff sued the defendant on a bill of exchange, and at the same time proceeded by summons in bankruptcy, under the 12 & 13 Vict. c. 106, s. 78. The action having been stayed on payment of debt and costs:—*Held*, that the plaintiff had no right to keep the bill until the costs in bankruptcy were paid. *Cornes v. Taylor*, 441

(2). *Overdue Bill.*

To an action on a bill of exchange, drawn by B. upon, and accepted by, the defendant, and indorsed by B. to the plaintiff, the defendant pleaded, secondly, that, before the accepting of the bill, the defendant authorised B., in his own name, but on account of the defendant, to lay bets on horse races, and B., in pursuance of such authority, laid such bets and lost them: that B. afterwards voluntarily, and without the request of the defendant, paid the losses on such bets; that the bets were wagering contracts; and the defendant accepted the bill for repayment to B.



point L. as their clerk or agent, for the purpose of selling coal, at a yearly salary of 100*l.*, was conditioned for the due accounting by L. of all monies received by him for the use of the company. L. performed the duties of such clerk or agent at the above salary, until May, 1851, when it was agreed between L. and the company to substitute for such salary a commission of 6*d.* per ton on all coal for which he should obtain orders. From that time L. was paid for his services by such commission, which amounted to a larger sum than the fixed salary. In 1852, L. was indebted to the company for sums which he did not pay over; and the company having sued the defendant on the bond:—*Held*, first, that the bond was valid, although the company had no power to deal in coal. Secondly, that the condition of the bond was restrained by the recital, so that the defendant, as surety, only undertook to be responsible for the faithful conduct of L. whilst he continued clerk at such fixed salary, and consequently the defendant was not liable after the change in the mode of remuneration. *The North Western Railway Company v. Whinray*, 77

(3). *Assistant Overseer.*

The acceptance by the holder of one office of another incompatible office does not vacate the former, unless it be such as he could determine by his own act simply, or unless that authority concurred in the new appointment, which could accept the surrender of or remove from the old one.

In the year 1843, P. was, according to the provisions of the 59 Geo. 3, c. 12, s. 7, nominated and elected by the vestry of a certain parish, and appointed by two justices, assistant overseer of that parish. The

warrant of appointment defined the duties of assistant overseer, one of which was, to account, when required by the overseers or vestry, for money received or expended, to the persons authorised to receive the same. By the above statute, every person so appointed is to continue assistant overseer until he shall resign such office, or until his appointment shall be revoked by the vestry. Security was, according to the statute, taken for the faithful execution of the office by bond with sureties, made to the churchwardens and overseers of the parish. P. continued to act in the execution of such office until March, 1852, when he resigned. In the year 1847, P. was appointed one of the overseers of the same parish, and he was afterwards, from year to year, re-appointed and acted as such until 1852. P. having made default in accounting for monies received by him as assistant overseer, and an action having been brought on the bond against one of the sureties:—*Held*, first, that, assuming the two offices to be incompatible (which they were not), the acceptance of the office of overseer did not vacate that of assistant overseer, since the holder could not divest himself of the latter office by his own act simply,—the word *resign* in the statute meaning a formal notification to the vestry of the act of giving up the office; and since, also, there was no implied motion from the old by appointment to the new office, for the authority appointing to that office could not remove; nor was there any implied surrender, because the same authority could not accept a surrender of the old office.

Secondly, that, if the offices were incompatible, the appointment as overseer would be either void or voidable only, in which case it would be vacated on appeal.

BOTTOMRY BOND.

See ADMIRALTY COURT.

BOUGHT AND SOLD NOTES.

See CONTRACT, (1).

**BRISTOL WATERWORKS
COMPANY.**

"The Bristol Waterworks Act, 1846," (9 & 10 Vict. c. cxxxii.) enabled the company to take the water of the river Chew, subject to certain conditions. In 1849, their works were completed, and they used the water of the river. In 1853, the 16 Vict. c. vii. passed, the 15th section of which provides, that "nothing contained in that Act, or in 'The Bristol Waterworks Act, 1846,' shall extend to authorise the company to take, use, or interfere with any land, soil, or water, or any rights in respect thereof belonging to the Duke of Cornwall, without the consent of the duke under his privy seal." After the passing of that Act, the company continued to take the water of the river as they had before done, since the completion of their works, and thereby diverted a stream which ought to have irrigated cer-

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CARRIER.

the carelessness, negligence, and default of the defendants, the luggage of the plaintiff was not safely and securely carried, conveyed, and delivered by the defendants to the plaintiff at S. ; but, on the contrary thereof, through the carelessness, negligence, and default of the defendants, a part of the luggage, to wit, the portmanteau and the goods contained therein, were for a long space of time lost to the plaintiff, and the plaintiff was deprived of the use, enjoyment, and possession of the same during the time aforesaid. Plea:—As to so much of the declaration as relates to the said copies of abstracts of title, conveyances, and leases, that the same were title deeds and writings contained in one package, and exceeding in value the sum of 10*l*., which package was delivered by the plaintiff to the defendants, as common carriers by land, at their office: that a notice was affixed in the office, that the defendants required an increased rate of charge to be paid for the conveyance of title deeds and writings; and that, at the time of the delivery of the package, the value and nature thereof were not declared by the plaintiff, nor the increased charge paid. New assignment:—That the plaintiff sues not for any loss of or injury to the said copies of abstracts of title, conveyances, and leases within the meaning of the 11 Geo. 4 & 1 Will. 4, c. 68, but for that the defendants did not use due and proper care in and about the carriage and conveyance of the same from W. to S., and so negligently conducted themselves that they were not delivered to the plaintiff at S., but on the contrary thereof, the said copies of abstracts of title, conveyances, and leases were for a long time, to wit, from the 3rd of June to the 22nd of September,

CERTIFICATE FOR COSTS. 939

delayed, kept, and detained by the defendants; and the plaintiff was deprived of the use, enjoyment, and possession of the same, although they were not lost or injured within the meaning of the said statute. On demurrer to the new assignment:—*Held*, that the loss or injury to goods against which a carrier is protected by the 11 Geo. 4 & 1 Will. 4, c. 68, is a loss *by the carrier* of the articles committed to him, or injury to them whilst in his care, and not a loss sustained *by the owner* in consequence of the non-delivery of the article in due time or altogether, or the loss of the use of the article by him; and that, as the plea did not allege a loss within the statute, it was bad, and the plaintiff was entitled to judgment.

Quere, whether the new assignment was good. *Hearn v. The London and South Western Railway Company*, 793

CA. SA.

See BAILIFF.

CAUSA PROXIMA.

See POLICY OF ASSURANCE, (1).

CAUSE OF ACTION.

See COUNTY COURT, (2).

CERTIFICATE OF ACKNOWLEDGMENT OF MARRIED WOMEN.

See DEVISE, (1).

CERTIFICATE FOR COSTS.

See PATENT.

CHARTERPARTY.

(1). *Construction of Charterparty.*

A declaration on a charterparty stated, that it was agreed between the defendant, the shipowner, and the plaintiff, that the ship should proceed to S., and there take on board from the agents of the freighter a full and complete cargo of coals, and therewith proceed to L., and deliver the same at the wharf to the order of the freighter (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind, during the said voyage always excepted); that the charter should be in force for six successive voyages; and that they should be made not later than the last day of February, 1853. Breaches, that the ship did not make six successive voyages, and that the defendant would not permit the ship to make more than three voyages. Plea, that, during the three voyages, the ship sustained great damage by dan-

(2). *Freight, Amount of.*

A vessel was chartered to carry a cargo of corn from Odessa to Gloucester, for freight payable at a certain rate per quarter. 2664 quarters were shipped at Odessa, and the master signed bills of lading in the usual form, and which contained a memorandum, "quantity and quality unknown." The vessel arrived at Gloucester with the cargo of corn, when it was measured at the Queen's Beam, and found to contain 2785½ quarters. In the course of the voyage a portion of the corn, from some unknown cause, had become heated and damaged, whereby its bulk was increased:—*Held*, that freight was payable on the quantity of corn shipped, and not on its measurement at the port of discharge:—*Per Pollock, C. B., Alderson, B., and Platt, B.*—*Martin, B., dissentiente. Gibson v. Sturge, 622*

(3). *Evidence of Custom.*

By charterparty, the defendant agreed to load on board a vessel at Trinidad "a full and complete cargo

wardens are liable to pay the rate, although they have no parochial funds for that purpose. *Mills v. Rydon*, 67

COLLATERAL COVENANT.

See STATUTE OF LIMITATIONS, (2).

COMMISSIONERS OF SEWERS.

(1). *Liability to fence Sewers.*

Commissioners of Sewers used for the purpose of their sewerage an ancient tidal ditch which ran along the side of the public highway:—*Held*, that the Commissioners were under no obligation to fence the sewer, so as to protect persons frequenting the highway. *Cornwall v. The Metropolitan Commissioners of Sewers*, 771

(2). *Right to sue and be sued by Secretary.*

Under the 11 & 12 Vict. c. 112; which enacts, that the Metropolitan Commissioners of Sewers may sue and be sued "in the name of the clerk for the time being," as explained by the 15th section of the 12 & 13 Vict. c. 93, which enacts, that the chief clerk to the Commissioners shall be called the secretary; and the word "clerk," in any of the Acts relating to the Commissioners, shall include "secretary;" the Commissioners must sue and be sued in the name of their secretary. *Clements v. Pollard*, 817

COMMITMENT (WARRANT OF).

See MAGISTRATE, (1).

COMMON.

On the trial of a question between the lord of a manor and a commoner, as to the right of the former to in-

close a portion of the waste, leaving a sufficiency of common for those having a right of common there, the waste being part of a royal forest:—*Held*, that the right of the Crown to turn deer on the waste did not form an element for the consideration of the jury on the question of sufficiency of common, in a case where no deer had been turned on the waste for upwards of twenty years. *Lake v. Plaxton*, 196

COMMON COUNT. See next heading.

COMMON LAW PROCEDURE ACTS.

See DISCOVERY OF DOCUMENTS.

EQUITABLE DEFENCE.

ERROR.

INTERROGATORIES.

WRIT OF SUMMONS.

(1). *Service Abroad.*

A British subject, residing in France, was there served with a writ of summons in the form prescribed by the 18th section of "The Common Law Procedure Act, 1852." The writ was specially indorsed with a claim in respect of promissory notes made abroad. The defendant appeared to the writ, and, after declaration, found that the cause of action did not arise within the jurisdiction of the Court, and was not in respect of a breach of a contract made within the jurisdiction, whereupon he applied to set aside the writ and proceedings under it:—*Held*, that there was no irregularity in the writ itself; and that the defendant, by appearing, had given the Court jurisdiction.

In such case, the defendant should apply to a Judge for particulars before appearance. *Forbes v. Smith*, 717

steam vessel which the company agreed to dispatch to Australia, the plaintiffs should have and transact the company's ship-broking business at the port of Sydney, upon the terms in the articles of agreement mentioned; and the company also agreed with the plaintiffs to provide them with a free passage to the said colony. Averments, that the plaintiffs have always been ready and willing to proceed to the said colony by the last-mentioned steam vessel, and have done all things necessary to entitle them to the agreed passage. Breaches, that the company after their complete registration have refused to establish any ship-broking business at Sydney, and have refused to dispatch the last-mentioned steam-vessel. On demurrer:—*Held*, that the first count was bad, since the completely registered company was not liable on the contract made by the provisionally registered company.

Held, also, by *Platt, B.*, and *Martin, B.*, that the second count was bad, since it did not disclose any consideration for the alleged agreement. *Parks, B.*, dubitante. *Payne v. The New South Wales Coal and Intercolonial Steam Navigation Company*,
283

CONSTABLE.

See METROPOLITAN POLICE ACT.

CONTRACT.

See RAILWAY COMPANY, (3).

(1). *Bought and Sold Notes.*

The plaintiff employed a broker to purchase for him some hemp. The broker having negotiated with the defendant, signed and sent to him a note of the purchase of 100 tons of hemp, to arrive by certain ships; "payment, at the option of

the buyer, by acceptance at six months from delivery, or cash in fourteen days less two-and-a-half per cent: *to be taken from the quay at the landing weights.*" The defendant afterwards signed and sent to the broker a note, differing in several material points from the note sent to him. On the 18th of September, a ship arrived with fifty tons of hemp, and on the 28th was warehoused at the broker's verbal request. On the 3rd of October the plaintiff declared his option to pay by bill. The defendant afterwards tendered to the broker delivery orders for "*about*" fifty tons of hemp, but the broker refused to receive them and give the plaintiff's acceptance, on the ground of the quantity being so described, and the defendant in consequence resold the hemp. The plaintiff then sued the defendant for not delivering the hemp, and declared on the note signed by the defendant as the contract between them. *Held*:—First, that it was a question for the jury whether both parties intended that the note signed by the defendant should be the contract, in which case there was a sufficient memorandum within the Statute of Frauds; or whether the defendant never intended to be bound as seller unless the buyer also signed a correlative note to bind him, and if so, there was no valid contract.

Secondly, that evidence was admissible to prove, that, by usage of trade, the delivery orders were in the usual form when goods were warehoused in bulk; and when that evidence was coupled with proof that the goods warehoused were actually of that weight at the landing scales, and that the particular orders referred to the identical goods so weighed, such delivery orders were a sufficient performance of the contract to deliver.

Thirdly, that the parol agreement to alter the written contract to deliver the hemp on the quay by substituting a delivery from the warehouse, did not operate as a new contract so as to be a waiver or discharge of the old one; for such agreement was void by the Statute of Frauds. But if the plaintiff had accepted the goods in the warehouse, or even the delivery orders in the form offered, as a performance of the contract on the defendant's part, there would have been a good answer by way of accord and satisfaction.

Quere—Whether the plaintiff declared his option and was ready to give his acceptance in due time. *Moore v. Campbell*, 323

(2). *Contract to Deliver at Distant Places.*

Where a manufacturer contracts to deliver a manufactured article at a distant place, and the article, when delivered to the carrier for the purpose of being conveyed, is of a merchantable quality, the purchaser is bound to accept it, "if only deteriorated to the extent that it is necessarily subject to in its course of transit from the one place to the other." *Bull v. Robison*, 342

(3). *Against "Losses, Costs," &c.*

The plaintiff signed and delivered to the defendant the following document:—"In consideration of your having, at my request, agreed to become a director of the Surrey Gas Association, and to be and act as director thereof, I hereby undertake and agree to guarantee, indemnify, and save you harmless from and against all losses, charges, damages, and expenses, which you may bear, incur, sustain, or be put to by reason thereof, or on account of actions as such director; and I do hereby further

agree to accept a transfer of twenty-four of your shares in the said association when thereunto requested by you, such transfer to be at my own expense, costs, and charges; and I hereby undertake to pay all calls and instalments for and in respect of such shares." The plaintiff having afterwards sued the defendant for a debt:—*Held*, that the defendant might set off the expenses incurred by him as a director as money paid for the plaintiff's use. *Hutchinson v. Sydney*, 438

(4). *Proposal for Contract.*

The plaintiffs, guardians of the poor of K. H., with a view to obtaining tenders for meat, &c., for the use of the workhouse, issued an advertisement, stating that they would receive tenders for the supply of the workhouse with meat for three months, from thirty to fifty stone, more or less, per week (describing the sort of meat); that sealed tenders were to be sent to the clerk of the corporation: and that *all contractors would have to sign a written contract after acceptance of the tender*. The defendant wrote to the plaintiffs to say, that he proposed to supply the workhouse with meat, according to advertisement, for the ensuing three months, at 6d. per pound. This tender was accepted by the plaintiffs, and the defendant was informed, that he was appointed butcher; but immediately afterwards, he wrote to the plaintiffs to say, that he declined the appointment:—*Held*, that, as a written contract was to be executed, the acceptance of the tender did not form a binding contract, so as to render the defendant liable for refusing to supply the workhouse with meat in accordance with his tender. *The Governor, Guardians, &c., of the Poor of Kingston-upon-Hull v. Petch*, 610

(5). *Notice under Contract.*

The plaintiff, an engineer, contracted with the defendants, a corporation, by deed to execute certain works. The deed contained a clause, by which it was covenanted that the defendants' engineer should have power to direct the way in which various portions of the work should be done; and if it should appear to him that they were not properly executed, and with due expedition, it should be lawful for him to give notice in writing to the plaintiff to alter any improper work, and to supply proper and sufficient materials and labour, and with due expedition to proceed therewith; and if the plaintiff should for the space of seven days after such notice had been given fail to comply therewith, then it should be lawful for the defendants' engineer to take the work out of the plaintiff's hands. It appearing to the defendants' engineer that the works were not being properly executed and with due expedition, he gave the following written notice to the plaintiff:—"I give notice to you to supply all proper and sufficient materials and labour for the due prosecution of the works, and with due expedition to proceed therewith; and further, that if you shall for the space of seven days after the giving of this notice fail or neglect to comply therewith, I shall as engineer, and on behalf of the said A. B. (the defendants), take the works wholly out of your hands:—" *Held*, that the notice was sufficiently specific. *Pauling v. The Mayor, Alderman, and Burgesses of the Borough of Dover*, 753

CONVEYANCE.

See STAMP, (1).

CONVEYANCER.

The 44 Geo. 3, c. 98, s. 14, which imposes a penalty on any unqualified person who acts as a conveyancer, is a prohibitory Act; and therefore such person cannot recover for conveyances drawn by him. *Taylor v. The Crowland Gas and Coke Company*, 293

CONVICTION.

See MAGISTRATE, (2).

COPYRIGHT.

The proprietor of a foreign print cannot claim copyright therein under the International Copyright Act (7 & 8 Vict. c. 12), unless the date of publication and name of the proprietor are engraved on the plate and printed on the print as required by the 8 Geo. 2, c. 43. *Avanzo v. Mudie*, 203

CORPORATION AGGREGATE.

Quære whether an action for a malicious prosecution will lie against a corporation aggregate?—Per *Alderson*, B., that it will not. *Stevens v. The Midland Counties Railway Company and Lander*, 352

COST BOOK PRINCIPLE.

See MINING COMPANY.

COSTS.

See BILL OF EXCHANGE, (1).
PATENT.

(1). *On Demurrer.*

Under the 3 & 4 Will. 4, c. 42, s. 34, the successful party on a demurrer is entitled to his costs in that behalf, whatever may be the ultimate determination of the cause. *Bentley v. Davies*, 347.

(2). *Special Case without Pleadings.*

Where, after writ issued, a special case is stated without pleadings, under "The Common Law Procedure Act, 1852," and there is no agreement as to costs, a plaintiff who has judgment for part of his claim is entitled to the general costs of the cause, and the defendant is entitled to deduct any costs which he may have incurred in respect of the matter on which he has succeeded. *Elliot v. Bishop*, 522

(3). *In Replevin.*

The 17 Car. 2, c. 7, applies to a rent charge as well as to a rent service.

The term "full costs" in that statute means ordinary costs as between party and party, and not costs as between attorney and client.

Where, in an action of replevin, both parties take down the record for trial, and the defendant succeeds, and his damages are assessed under the 21 Hen. 8, c. 19, s. 3, he is entitled to the costs of his record.

Under the 17 Car. 2, c. 7, a successful defendant in replevin is not entitled to the costs of making the distress. *Jamieson v. Trevelyan*, 748

COUNTERMAND OF TRIAL.

A plaintiff cannot countermand notice of trial after the cause has been made a remanet. *Tempany v. Rigby*, 476

COUNTY COURT.

(1). *Jurisdiction.*

The defendant was sued in the county court in the double capacity as executor of A. and administrator of B. On the trial, the defendant objected that the plaintiffs ought to elect in what capacity they proceeded against him; and further, that

there was no evidence that the attorney, who appeared in support of the claim, had been duly authorised by the plaintiffs, who were the guardians of the poor of a parish, to bring the action. The judge overruled both objections, and gave judgment against the defendant generally:—*Held*, assuming the decision to be incorrect, that, as the Judge acted within his jurisdiction, such objections afforded no ground for a prohibition. *The Guardians of the Lexden and Munster Union v. Southgate*, 201

(2). *Cause of Action.*

The term "cause of action" in the 60th section of the 9 & 10 Vict. c. 95, which gives jurisdiction to the county court of the district "in which the cause of action arose," means the "whole cause of action."

Therefore, where an association, of which the defendant was a member, offered a reward for the apprehension and prosecution of persons committing certain offences, such reward to be paid on conviction; and the plaintiff, within a district of the county court of G., apprehended an offender, who was tried and convicted within a district of the county court of H.:—*Held*, that the county court of G. had no jurisdiction to entertain a plaint for the recovery of the reward. *Hernaman v. Smith*, 659

(3). *Abandonment of Excess.*

The abandonment of the excess of a claim above 50*l.*, in order to give a county court jurisdiction, must be the act of the plaintiff himself, or of some person authorised by him, and not the act of the Judge.

Therefore, where a county court judge, at the hearing of a plaint, of his own accord and against the con-

DECLARATION.

sent of the defendant, amended the particulars of demand by reducing the claim to 50*l.*, and gave judgment for the plaintiff for that amount, the Court granted a prohibition. *Hill v. Swift*, 726

(4). *Removal of Judgment.*

A judgment of a county court is not removable into a superior Court. The 19 Geo. 3, c. 70, and 1 & 2 Vict. c. 110, by which the judgments of inferior courts of record were removable into the superior Courts, have no application to the judgments of county courts. *Moreton v. Holt*, 707

COVENANT.

See STATUTE OF LIMITATIONS, (2).

CUSTOM.

See CHARTERPARTY, (3).

DAMAGE.

See MINE, (1), (2).

PASSENGERS' ASSURANCE COMPANY.

PAYMENT.

DECLARATION.

See COMMON LAW PROCEDURE ACT, (2).

Time to declare.

The Reg. Gen. Hil. Term, 2 Will. 4, r. 35 (repealed and re-enacted in terms by the 15 & 16 Vict. c. 76, s. 58), which provides, that "a plaintiff shall be deemed out of Court unless he declare within one year after the writ of summons is returnable," does not apply to the case of proceedings stayed for more than a year by an order for security for costs.

But if the security be given at any time of the year, the plaintiff

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must declare before its expiration. *Ross v. Green*, 891

DEED.

See STATUTE OF LIMITATIONS, (4).

By indenture, between the executors of E. D. of the one part, and R. D. of the other part, reciting, that the testator, by his will (after certain bequests), gave the residue of his personal estate equally amongst his children, and also directed that his daughter M. should only receive 500*l.* of her share at the age of twenty-one, and that his executors should place out the remainder at interest, to be paid her during her life, and, after her death, such remaining principal to be equally divided amongst her children, and, in case of her death without issue, amongst such of the testator's children as should be then living; that E., one of the executors, purchased a farm, which he conveyed to R. D., in consideration of 2000*l.*; that there was in the hands of the executors 1620*l.*, of which 400*l.* was in trust for M.; and that the executors had agreed with R. D., that the said sum of 1620*l.* should be received by him, and applied towards the payment of the purchase-money of 2000*l.* for the said estate, and should remain in his hands, with interest at 4*l.* 10*s.* per cent.; and that R. D. should also be chargeable with such principal money from time to time as might become payable, agreeably to the will of the testator: It was witnessed, that, in consideration of the said sum of 1620*l.* trust money, so by these presents *lent* to R. D. as aforesaid, R. D. covenanted with the executors to pay them, for the use of the testator's children, interest for their respective shares at the rate of 4*l.* 10*s.* per cent.; and also to pay such principal money as

might become payable, from time to time, *agreeably to the recited will*. Then followed a power to receive the rents or sell the premises on default in payment of the interest or principal; also a covenant by R. D. to pay the interest and principal to the executors for the use of the testator's children; and a covenant by the executors, that R. D. might, on payment of interest, retain in his hands the said sum of 1620*l.*, agreeably to the will of his late father. All the other children of the testator died in the lifetime of his daughter M., who died without issue. The administrator of the surviving executor having brought an action against the executor of R. D. to recover the 400*l.*:—*Held*, that this was money lent, which the defendant was bound to pay to the plaintiff, and not to the administrator de bonis non of the original testator. *Dod v. Dod*, 878

DELIVERY ORDER.

See CONTRACT, (1).

DEER.

See COMMON.

DEMURRER.

See COSTS, (1).

DEVISE.

(1). *Merger of Life Estate.*

R. B., being seised in fee of five dwelling-houses, on the 8th of February, 1788, devised the same to his wife for her life, and after her death he devised two of the houses to his daughter Ellen, the wife of G. Fleming, for her separate use, with power to dispose of the same at her death amongst her children which should be then living; and after the death of his wife, the testator devised the

three remaining houses to Ellen Bancks, the daughter of his late daughter, for her sole use, with power to dispose of the same among her lawful issue her surviving, and their heirs, for ever, as she should think fit; and if either his said daughter or granddaughter should die without issue, he gave the survivor what the deceased had before had, subject to the same limitations; and if both should die without issue them surviving, then the testator gave the property to be divided amongst his brothers and sisters, and others. In 1788, the testator died, when his wife entered into possession of the property, and enjoyed the same till her death, in 1810. In 1798, Ellen, the widow of G. Fleming, intermarried with the defendant, and died in 1848, without issue. On the death of the testator's wife, the plaintiff, and defendant in right of his wife, entered into possession of their respective shares of the property. By an indenture, made in 1843, between the defendant and his wife of the first part, J. C. of the second part, and J. Lord and W. Ackerley of the third part, after reciting the above facts, and that the defendant was seised in fee simple of the property, and that the said Ellen Ollerton was the testator's heiress-at-law, and that the defendant (her husband) was seised in the fee simple of the property thirdly thereafter described, and that the defendant and his wife were indebted to the said J. Lord and W. Ackerley in a certain sum of money lent; it was witnessed, that the said J. Ollerton and Ellen his wife, in consideration of the money so lent, and of 10*s.* paid to them by the said J. C., the said E. Ollerton joining therein, as well to release and convey the said hereditaments firstly and secondly thereafter described,

as to release and extinguish every right and title to dower which she might have with or out of the said hereditaments thirdly thereafter described, and to the intent that the then reciting indenture might operate and take effect by force or under the Act for rendering a release as effectual for the conveyance of freehold estate as a lease and release by the same parties, did grant and convey to the said J. C. and his heirs, first, those two dwelling-houses by the said will devised to the said Ellen Ollerton ; and, secondly, those three dwelling-houses by the said will devised to E. B. (the testator's granddaughter), and all other lands, &c., which the said Ellen Ollerton was entitled to as heiress-at-law of the said testator ; and, thirdly, certain premises belonging to the said J. O., &c., to hold the same, subject as to the premises secondly described to the life estate of the said E. B., to the said J. C. and his heirs, to the use of the said J. Lord and W. Ackerley for 1000 years, upon certain trusts ; and after that term to such uses as J. Ollerton and Ellen his wife should by deed in writing appoint, and, in default of such appointment, to the use of the survivor of them, as he or she might appoint by deed or direct by will, and, in the meantime, to the use of J. Ollerton and Ellen his wife during their joint lives, and the survivor of them ; and it was in the said indenture declared, that the said term of 1000 years was so limited to the said J. Lord and W. Ackerley for the purpose of securing the repayment of the said sum so lent, with interest. Ellen Ollerton died without having made any appointment of the property limited by the settlement. This indenture was prepared by J. Lord and W. Ackerley, who were the only solici-

tors employed in the transaction, and was executed by J. Ollerton and Ellen his wife, and was acknowledged by the latter before the said J. Lord, one of the mortgagees of the said indenture, and one E. Woodcock, perpetual commissioners for taking the acknowledgments of married women, the said E. Woodcock not being in any manner interested in the transaction giving occasion for the said acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned. And the commissioners signed a certificate of their having taken such acknowledgment in the form pointed out by the 3 & 4 Will. 4, c. 74 ; which certificate, and the affidavit verifying the same, was filed of record, according to the rules of the Court of Common Pleas. In ejectment by Ellen Banks to recover part of the premises devised to Ellen Ollerton :—

Held, first, that the circumstance of the remainder devolving on Ellen Ollerton as heiress-at-law, at the same time that her life estate took effect under the will, did not operate as a merger of the life estate, so as to bar the contingent remainder which the plaintiff had in the property in question.

Secondly, that, assuming the deed of 1843 to have been properly executed by Ellen Ollerton, so as to pass her interest in possession and reversion, it operated to destroy the plaintiff's contingent remainder, since the union of the two estates was necessary to raise the uses limited by the deed, and consequently the life estate was thereby merged in the reversion in fee.

And thirdly, that inasmuch as it did not appear on the face of the certificate of the acknowledgment, that the J. Lord mentioned therein

was the same J. Lord the mortgagee, the certificate could not be thus questioned, and the execution of the deed was valid. *Bancks v. Ollerton*, 168

(2). "*By way of Jointure.*"

W. T., by will, made in 1818, devised to his son R. T. an annuity or rent-charge of 300*l.*, issuing out of certain land, for his life, payable quarterly; and by a codicil of even date, he declared that, in case his son should marry, it should be lawful for him, if he should think proper, to settle an annuity of 300*l.* upon the woman he might happen to marry, *for her life, by way of jointure*, to be charged upon the said real estate in like manner as the annuity or rent-charge of 300*l.* devised to his son: and that, in case his said son should so settle an annuity, it should be by way of substitution for the annuity given to him by the will; and that, immediately upon such substitution and settlement of the said annuity, the annuity given by the will should cease. After the testator's death, R. T. married, and, in exercise of the power given by the will, by a deed-poll settled and appointed an annuity of 300*l.* a year, by way of jointure, on his wife, declaring the same to be charged on the testator's estate, in like manner as the former annuity was charged by the will:—*Held*, that the terms "*by way of jointure*," in the codicil, did not postpone the wife's annuity till after her husband's death, the testator's intention being to give the husband the power to settle an annuity in lieu of that given to him by the will, and to take effect immediately; and consequently, on execution of the deed-poll, the wife took the substituted annuity.

The doctrine of ademption is of a purely equitable character, and does

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not prevail in a Court of law. *Jamieson v. Trevelyan*, 269

(3). *Estate for Life.*

A testator, by his will, made in 1802, devised and bequeathed to his wife, during her natural life, the interest or rent of his house, with the yard thereunto adjoining and belonging, situate in the parish of N., together with all his other goods and effects whatsoever; and after the death of his wife, he gave and bequeathed the said house, together with all his other goods and effects whatsoever, jointly, unto his four children (one of whom was his heir at law), to be equally divided amongst them. All the rest, residue, and remainder of his money, goods, and chattels, he gave and devised to his said wife:—*Held*, that the children took an estate for life only in the house. *Harding v. Roberts*, 819

DISCOVERY OF DOCUMENTS.

See INTERROGATORIES.

An application, under the 50th section of "The Common Law Procedure Act, 1854," for the discovery of documents, may be made before plea pleaded.

It is no answer to the application, that the documents are such as the party is privileged from producing: if that be so, the fact may be shewn in the affidavit to be made in obedience to the rule. *Forshaw v. Lewis*, 712

DISTRESS.

See COSTS, (3).

DISTRICT CHURCH.

See CHURCH.

ECCLESIASTICAL INCUM-
BENT.*See* LAND TAX.

EQUITABLE DEFENCE.

(1). To an action upon an indenture of lease for nonpayment of rent, and for non-repair of the premises, the defendant proposed to plead (*inter alia*) as a defence on equitable grounds, under the 17 & 18 Vict. c. 125, s. 83, a plea to the effect, that it was agreed between the plaintiff and the defendant, that the latter should surrender the tenancy to the plaintiff, by yielding up possession of such portion of the premises as was in the occupation of the defendant, and by permitting the plaintiff to receive all future rents of such part of the premises as was occupied by the defendant's tenants, and by permitting the tenants to attorn to the plaintiff, the defendant to pay a certain sum of money, and give up certain machinery; all of which was to be done by the defendant, and accepted by the plaintiff, in satisfaction of the covenants of the lease; and that the lease and counterpart should be respectively given up to be cancelled. The plea then alleged, that, in pursuance of such agreement, the defendant paid the plaintiff the said sum of money, and gave up the machinery, and delivered the lease to him, and that the plaintiff excused himself from delivering up the counterpart; that the defendant accordingly withdrew from the possession of the premises which he occupied, and had never since been in the enjoyment or occupation thereof, or in the receipt of the rents; and that he had always permitted the plaintiff to receive the same, and the tenant to attorn. The plea then contained

an averment of performance by the defendant of all other conditions precedent, and that the defendant was ready and willing to do all things necessary to be done by him, for putting an end to the tenancy; and that the action was brought in fraud and breach of the said agreement, and that it was wholly the fault and laches of the plaintiff that the surrender was not completed.

Upon an application to plead several matters, the Court refused to allow this plea to be pleaded with other pleas, as not disclosing an equitable defence within the meaning of the 17 & 18 Vict. c. 125; on the ground that a Court of equity would require the execution by the defendant of a valid surrender of the term as a condition precedent to staying the action, and that the superior Courts of common law have no power to enforce such condition. *Mines Royal Societies v. Magnay*,
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(2). In trover for goods, the defendant was allowed to plead, with other pleas, the following equitable defence:—That the plaintiff was the owner of certain chemical works; that the goods in question were stock in trade and materials on the premises; that the defendants agreed to purchase the chemical works from the plaintiff, and the goods in question were to be included in the property sold; that certain brokers were employed to make the contract, and that they made it by bought and sold notes; and, by mistake of the brokers, the notes were so worded as not to include the stock in trade and materials, which were intended to be included by both the plaintiff and the defendants; that possession of the chemical works, including the goods in question, has been delivered by the plaintiff to the defendants, and the purchase completed; and

(4). *Ancient Map—Custody of Document.*

To an action of replevin alleging the taking of the goods in the plaintiff's dwelling-house in the county of Norfolk, the defendants pleaded, first, that they did not take the goods modo et forma; and secondly, that they took them in the parish of S., in the county of Suffolk, *absque hoc*, that they took them in Norfolk, adding, by way of avowry for a return of the goods, that they took them as overseers of the poor of S. under the 43 Eliz. c. 2. The plaintiff at the trial, in order to shew that the house in question was situated in Norfolk, tendered in evidence an old map, printed on paper from an engraved copper-plate, and having on the face of it the following words, "A new map of the county of Suffolk, taken from the original map published by Mr. J. K. in 1736, who took an actual and accurate survey of the whole county; now republished, with corrections and additions by J. & W. K., sons of the author, 1766, and engraved by J. R." This map was produced by a witness, who was a magistrate of both counties, and had bought the map twelve years before the trial, and, during the time it had been in his possession, it had not been altered:—*Held*, on error, that the map was not admissible in evidence.

The plaintiff also tendered in evidence the instrument of apportionment of the tithe rent-charge of S., duly sealed and confirmed by the Tithe Commissioners, dated ten years previously, together with the map annexed thereto and referred to therein. This instrument did not, nor did the map annexed, include the plaintiff's house or any land on that side the river on which the house was situated.

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Quere, whether these documents were admissible in evidence in support of the affirmative of the issue raised by the second plea. *Hammond v. Bradstreet*, 390

EXCESS.

See COUNTY COURT, (3).

EXECUTION.

See COUNTY COURT, (4).
INSOLVENT.

FALSE REPRESENTATION.

See BANK.

FIXTURES.

By indenture, C. demised to the plaintiff an unfinished messuage for the term of ninety-seven years. The indenture contained a covenant by the plaintiff, that, at the expiration of the term, he would deliver up the demised premises unto C., "together with all locks, keys, bars, bolts, marble and other chimney-pieces, foot-paces, slabs, and other fixtures, and articles in the nature of fixtures, which shall at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging." The plaintiff took possession of and completed the messuage, and fitted it up with things necessary for carrying on the business of a tavern-keeper and licensed victualler; and for that purpose put in the premises certain fixtures of the description called and known as trade and tenant's fixtures. The defendant afterwards contracted with the plaintiff to purchase from him an underlease of the premises, and the goodwill, and also the furniture, fixtures, stock in trade, &c., at a valuation. In pursuance of this contract, the plaintiff executed to

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London, about the purchasing and selling for the defendant in the City of London of shares ; and that the plaintiff was not duly licensed in pursuance of the statute :— *Held*, on demurrer, that the pleas were bad. *Jessopp v. Lutwyche*, 614

GOODS, WARES, AND MER-
CHANDISE.

See MINING COMPANY.

GOODWILL OF BUSINESS.

See STAMP, (1).

GUARANTEE.

(1). *Concealment of Material
Circumstances.*

The rule which prevails in assurances upon ships and lives, that all material circumstances known to the assured must be disclosed, though there be no fraud in the concealment, does not extend to the case of guarantees. In the latter case, the concealment, to vitiate the guarantee, must be fraudulent.

A. obtained a loan of 10,000*l.* from the plaintiffs, an insurance company, on the deposit of certain railway shares, with a stipulation, that, if the market value of the shares fell below a certain amount, A. should either furnish fresh shares or pay their value, so as to leave a given surplus. When the time for repayment of the loan arrived, the shares having fallen in value, the time was extended to a further period on the deposit of additional shares and the acceptance of A.'s brother (B.) to the amount of 2000*l.* Before the loan became due in pursuance of the terms of this second arrangement, B. applied to the plaintiffs to be released from his acceptance, upon procuring the guarantee

of the defendant and three others for 500*l.* each. The plaintiffs assented to this arrangement. A. then informed the defendant of the loan and of its terms, and told him, that, unless he could procure security, his shares would be sold at a great loss ; but the arrangement as to the withdrawal of B.'s acceptance was not communicated to the defendant, and he was wholly ignorant of it. The defendant executed a guarantee, which did not refer to B.'s acceptance for 2000*l.*, but recited the consideration for the guarantee to be the original loan, and of the plaintiffs' agreeing not to require any further security in the event of the depreciation of the shares as provided for by the original agreement. In an action on this guarantee — *Held*, that the non-communication of the private arrangement between the plaintiffs and A. and his brother did not amount to constructive fraud, and afforded no defence to the action. *The North British Insurance Company v. Lloyd*, 523

(2). *Mode of Accounting with
Principal.*

The plaintiffs, bottle manufacturers in Scotland, in 1840, entered into negotiations with one W. M'K. for the employment of the latter as their agent at Leith for the sale of their bottles. On the 4th of January, 1841, W. M'K. wrote to the plaintiffs, and offered to act as their agent upon certain terms, amongst which were the following :—"First. All bottles to be sold at your risk, and all monies received for you to be duly accounted for by me and remitted to you from time to time. Fourthly. Security to be found for my introductions to the amount of 500*l.* sterling." W. M'K. was appointed by the plaintiffs to act as their agent, and they sent to him the fol-

INFANT.

tween the plaintiffs and their agent, W. M'K., as to the mode of accounting by means of promissory notes, as above mentioned, did not discharge the surety from his liability upon the guarantee: *Pollock, C. B.*, dissentiente. *Stewart v. M'Kean*, 675

GUARDIANS.

See POOR.

HIRED GOODS.

See INNKEEPER.

ILLEGAL CONTRACT.

See GAMING CONTRACT.

INFANT.

The defendant, whilst an infant, accepted, for the accommodation of the drawer, a bill of exchange for 500*l.*, which was indorsed to the plaintiff. When the bill became due the drawer was abroad, and the plaintiff agreed with the defendant to hold the bill on receiving interest. After the defendant came of age, he wrote to the plaintiff as follows:—"Has L. paid you 80*l.* for interest on the 500*l.* bill? Answer by return of post." Subsequently, the plaintiff's brother called on the defendant, and told him that the plaintiff was uneasy about the bill, when the defendant replied that the debt should be paid; and the plaintiff's brother, having requested him to write to the plaintiff to that effect, the defendant wrote the following letter:—"Your brother tells me that you are very uneasy about the 500*l.* bill drawn by Mr. Pottinger upon me. Pray make yourself easy about it, as I will take care that it is paid; and Sir Henry comes to England in June:—"*Held*, per *Parke*, B., and *Alderson*, B., that there was

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no ratification by the defendant of the contract made during infancy within the meaning of the 9 Geo. 4, c. 14, s. 5, but a mere assurance that the defendant would take care that the drawer paid the bill. *Platt, B.*, and *Martin, B.*, dissentientibus. *Mawson v. Blane*, 206

INFORMATION.

See EVIDENCE, (1).

INNKEEPER.

B. lent a pianoforte to a professional pianist whilst staying as a guest at an inn, the innkeeper well-knowing that the pianoforte was the property of B. :—"*Held*, that the innkeeper had no lien on the pianoforte for the bill due from his guest. *Broadwood v. Granara*, 417

INQUISITION.

See LANDS CLAUSES CONSOLIDATION ACT.

INSOLVENT.

See BANKRUPT, (3).

S., by indenture, assigned to the plaintiff (amongst other things) his crops of grain upon his farm, as a security for money lent. By the indenture it was declared and agreed, that it should be lawful for the plaintiff at any time to seize and take possession of the crops and other effects thereby bargained and sold, and all such crops and other effects which should or might from time to time be substituted in lieu of the crops thereby assigned, or which should from time to time be found on or about the farm, and the same to sell and dispose of, and out of the proceeds pay all costs and retain all monies due to the plaintiff. On the 21st of February, 1849, a sum of

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deliver (before declaration by the plaintiff, and before plea by the defendant) written interrogatories to his adversary to be answered by him, the Court will not exercise that power by allowing a defendant to deliver interrogatories *before plea*, except under special circumstances, as, for instance, where the defendant makes out a case of urgent necessity.

Quere, whether the right to deliver interrogatories under that section, is confined to such cases as would have afforded ground for a bill of discovery in a Court of equity. *Martin v. Hemming*, 478

(2). *Questions tending to criminate Witness.*

On an application to the Court for leave to deliver interrogatories in writing to the opposite party in the cause, under the 51st section of the Common Law Procedure Act of 1854, 17 & 18 Vict. c. 125, the affidavit of the attorney of the party sought to be interrogated, that he believes that the questions proposed will criminate his client, is no answer to the application. Such objection ought to be made by the party himself when he has been sworn.

Quere, whether a witness, to entitle himself to object to a question, on the ground that it has a tendency to criminate him, is bound to satisfy the Court that such will be its effect, or whether he is himself the sole judge of its effect. *Osborn v. The London Dock Company*, 698

(3). *When allowable.*

The plaintiff instructed the defendant, a broker, to purchase certain goods for him. The defendant accordingly, professing to have bought the goods as a broker, delivered a bought note to the plaintiff—

“Bought by order and for account of T. & Co. (the plaintiff) *from principal*, 102 barrels of raisins, &c.” The plaintiff paid to the defendant the purchase money, and received from him a delivery warrant for the goods; but, upon the plaintiff's presenting it to the wharfingers holding the goods, they refused to deliver them, on the ground that the warrant was fictitious. In an action for money had and received to recover back the money so paid, the Court allowed the plaintiff to deliver interrogatories to the defendant, under the 51st section of the 17 & 18 Vict. c. 125, requiring him to answer, whether he acted in the transaction as principal or agent, and, if as agent, to name his principal. *Thöl v. Leask*, 704

INTROMISSIONS.

See GUARANTEE, (2).

ISSUABLE PLEA.

To a count on a bill of exchange, drawn by G. S. upon and accepted by the defendant, and indorsed by G. S. to the plaintiffs, the defendant, being under terms of pleading issuable, pleaded that he accepted the bill, and delivered it to G. S. as the plaintiffs' agent and on their account, in part payment of the purchase money on the sale by the plaintiffs to the defendant of a certain ship; that the defendant was induced to purchase the ship by the false and fraudulent representations of the plaintiffs and G. S. then made to him by them—that the ship was as strong as wood and iron could make her, and that she could be sent to sea without any expense. The plea then alleged, that the ship was not, at the time of the representation, as strong as wood and iron could make her, but, on the contrary, was weak



LAND TAX.

chequer), that, as the Judge had jurisdiction to make the order, the Court could not inquire whether it was improperly made, and therefore the plea was bad. *Webster v. Emery*, 901

JUDGMENT OF COUNTY COURT.

See COUNTY COURT, (4).

JUDGMENT CREDITOR.

See INSOLVENT.

JURISDICTION.

See COUNTY COURT, (2).
JUDGE'S ORDER.

JURORS.

See LANDS CLAUSES CONSOLIDATION ACT.

JUS TERTIL.

See INSOLVENT.

JUSTICE OF THE PEACE.

See MAGISTRATE.

LANDS CLAUSES CONSOLIDATION ACT.

The Court will not set aside the verdict on an inquisition to determine the compensation for land taken under the 8 & 9 Vict. c. 18, on the ground that some of the jurymen were not qualified to act as jurors; the remedy, in such case, being by challenge. *In re The Chelsea Waterworks Company; Ex parte Phillips*, 731

LAND TAX.

Redemption of Land Tax.

In 1798, Dr. K., the ecclesiastical incumbent of a living, redeemed the

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land tax charged on his rectory out of his own estate, under the 38 Geo. 3, c. 60, and did not, in his contract with the Commissioners for the Reduction of the National Debt, declare his option to be considered a purchaser of the land tax (whereby, according to the provisions of the 37th section of that statute, the lands became exonerated from the land tax, and chargeable, for the benefit of the incumbent, his executors, administrators, and assigns, with the amount of the 3*l.* per cent. Consols transferred, and with the payment of a yearly sum, by way of interest, equal to the amount of the land tax redeemed):—*Held*, first, that Dr. K., as an ecclesiastical incumbent, had such an estate as is contemplated by the 37th section of the 38th Geo. 3, c. 60, taken in connection with the 39 Geo. 3, c. 6, s. 5; and that he was entitled to create the charge upon the living; and, secondly, that his personal representatives were entitled to maintain an action against the succeeding incumbent for the recovery of the interest accrued due on the amount of the 3*l.* per cent. Consols so transferred, from the time when the latter succeeded to the rectory. *Kilderbee v. Ambrose*, 454

LEVEL.

See MINE, (3).

LIBEL.

In an action for libel, it is no justification that the libellous matter was previously published by a third person, and that the defendant, at the time of his publication, disclosed the name of that person, and believed all the statements contained in the libel to be true. *Tidman v. Ainslie*, 63

LIEN.

See INNKEEPER.

LIFE ESTATE.

See DEVISE, (3).

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LIQUIDATED DEMAND.

See WRIT OF SUMMONS.

LIVERPOOL PILOT ACT.

The 35th section of the Liverpool Pilot Act, 5 Geo. 4, c. lxxiii., enacts, that "in case the master or commander of any ship outward bound, except &c., shall *proceed to sea*, and shall refuse to take on board and employ a licensed pilot, such master &c. shall pay to the pilot who first or who only shall offer his service, and shall be so refused, according to the different rates directed by the Act to be paid, in like manner as if the pilot had been received and employed in piloting the vessel into or out of the port, together with all expenses to be incurred in the recovery of the same."

A ship left the docks of Liverpool with a pilot on board on the 2nd of December. On the 3rd the plaintiff was engaged to raise an anchor of the ship which she had lost in the river; and in doing so, by some mismanagement and neglect of those on board the ship, the plaintiff's boat, which was alongside, was injured and sunk. At the time of the accident the ship was at anchor in the river Mersey, she was in the service of the Post-office, and was under contract to sail on the following day (the 4th), but the master was not on board, and the riggers were engaged in completing her rigging:—*Held*, (assuming that under the Act of Parliament an outward bound vessel

MAGISTRATE.

when proceeding to sea is bound to take a pilot on board), that, under the circumstances, this ship was not at the time *proceeding to sea*.

If, in the case of a vessel proceeding to sea under the care of a pilot, damage is done by the mismanagement of the vessel, the owners, in order to exonerate themselves, are bound to shew that the accident was occasioned *exclusively* by the pilot's default. *Rodrigues v. Melhuish*, 110

LOCAL AND PERSONAL ACT.

The Ramsgate Harbour Acts, 32 Geo. 3, c. 74, and 55 Geo. 3, c. lxxxiv., are local and personal Acts, within the meaning of the 5 & 6 Vict. c. 97; and therefore the period of limitation of actions for anything done in pursuance of those Acts is two years. *Moore v. Shepherd*, 424

LONG WEIGHT.

See WEIGHTS AND MEASURES.

LOSS OF GOODS.

See CARRIER.

LUGGAGE OF PASSENGER.

See RAILWAY COMPANY, (1).

LUNATIC.

See EVIDENCE, (2).

MAGISTRATE.

(1). *Form of Commitment*.

Warrants of commitment, convictions, and other instruments made by magistrates, are sufficient, if they correspond with the forms given in the schedule to the 11 & 12 Vict. c. 43.

The 16 & 17 Vict. c. 30, empowers two justices of the peace to punish,

on summary conviction for assaults committed on females, or children under fourteen years, any person charged before them "*sitting at a place where the petty sessions are usually held*:"—*Held*, that a warrant of commitment for such offence, in the form given by the 11 & 12 Vict. c. 43, sched. (P. 1.), was good, although it did not state that the justices before whom the party was charged were sitting at a place where petty sessions are usually held.

As no certiorari issues out of the Court of Exchequer, a conviction is properly brought before it, if verified by affidavit.

A commissioner before whom an affidavit is sworn, ought to certify that any exhibit annexed is the document referred to in the affidavit.
Allison, In re, 561

(2). *Notice of Action.*

In an action against a magistrate for having, in the execution of his office, acted maliciously and without reasonable and probable cause, he is entitled to notice of action as required by the 11 & 12 Vict. c. 44, s. 9. In such case, the question whether he acted *bonâ fide*, or used his office colourably, does not arise.
Kirby v. Simpson, 358

MALICIOUS PROSECUTION.

See CORPORATION AGGREGATE.

MAP.

See EVIDENCE, (4).

MARRIAGE SETTLEMENT.

See STAMP, (2).

MASTER AND SERVANT.

See PLEA, (1).

MASTER OF SHIP.

See BARRATRY.

MEMORANDUM, 397.

METROPOLITAN POLICE ACT.

Under the 8th section of the Metropolitan Police Act, 2 & 3 Vict. c. 47, which enacts, "that it shall be lawful for the commissioners of police, if they shall think fit, on the application of any person or persons shewing the necessity thereof, to appoint and swear any additional number of constables to keep the peace at any place within the metropolitan police district, at the charge of the person or persons by whom the application shall be made, but subject to the orders of the said commissioner, and for such time as they shall think fit:" the appointment of a constable is an appointment of the person to act as a constable for all purposes, although the application to the commissioners mentions a particular purpose only, as, for instance, the necessity for an additional constable to execute distress warrants, to recover the amount due for parish rates. The necessity for such appointment is entirely a matter upon which the commissioners are to exercise their own judgment. *Allen v. Preece*, 443

MINE.

(1). *Cause of Action.*

A declaration stated, that the plaintiffs were seised in fee of certain land and houses, which were contiguous to certain other land, and the plaintiffs were entitled to the support of their said land and houses by the said land to which the same were so contiguous, and by the strata under the same, and also by the strata of minerals under the plaintiffs' land; and the defendant wrongfully, and without leaving any



lineated, so far as the same could be conveniently ascertained; and they also made a schedule or description of the several gales, and they awarded that the gales should be of the extent and bounded as shewn and described in the said plans and schedule. The commissioners thereby also determined, that the defendant, as a free miner, was entitled to a certain gale, called "Prosper Free Level;" and that the plaintiff, as a free miner, was entitled to a certain other gale, forming part of a colliery called "Strip-and-at-it Colliery." The schedule thus described the "Prosper Free Level Colliery:"—"All that tract of coal in the Lowrey vein bounded as follows, that is to say, commencing at the point where the *said level* struck the coal, and extending in an eastward direction *as deep as the said level will drain*, to the line of stones numbered 48 and 49, to be set up as the western boundary of the Collingwood colliery, and in the land up to the old workings." The Lowrey vein ran in a diagonal direction from south to north, towards the surface of the land where it cropped out, and the Strip-and-at-it Colliery was below and immediately adjoining the "Prosper Free Level" on the south. It was the custom of miners, on obtaining a gale, to drive an adit or excavation from the surface of the land toward and into the coal in an horizontal direction, but at such an inclination upwards as to allow water to run and flow from the mine along the same to the surface of the land, and every miner who had driven such an adit or excavation was entitled to all the coal which could be drained by an adit or excavation continued from the point where the adit or excavation so made from the surface first struck the coal. Before the making of the

award, the Prosper Free Level Colliery had been worked for some distance eastwards by means of pits sunk from the surface. There was a level extending eastward from the point where the adit or excavation first struck the coal, and the defendant got coal at a point below that level, and at a depth which could not be drained by such level. According to the plan made by the commissioners, the defendant had exceeded the limits of his gale, and had worked coal within the limits of the gale awarded to the plaintiff:—*Held*, in the Exchequer Chamber, that, in the description in the schedule of the "Prosper Free Level Colliery," the term "level" meant the then existing level, which was to be the measure of the southward workings, and was to afford an outlet for all the waters of the colliery merely by gravitation, and consequently there was no discrepancy between the schedule and plan, and the defendant, by working below that level, had trespassed on the colliery of the plaintiff.

Quere, whether, if there had been a discrepancy between the schedule and the plan, the latter was to be wholly rejected. *Brain v. Harris*, 908

MINING COMPANY.

By indenture, E. granted to Y., his executors, administrators, *co-adventurers*, and assigns, full license, power, and authority to dig, work, mine, and search for ore, minerals, and metals in and throughout certain limits, and the same to carry away and dispose of to their own use, for twenty-one years. The adventure was a joint-stock company, conducted on the cost-book principle. P. was purser of the mine, which was purchased with money raised by calls on the shareholders. The mode of



PAROCHIAL FUNDS.

See CHURCH.

PART OWNER OF SHIP.

See BARRATRY.

PARTICULARS OF DEMAND.

See COMMON LAW PROCEDURE ACTS, (1).

PASSENGERS ASSURANCE COMPANY.

The plaintiff effected with the defendants a contract of assurance, which stated that the plaintiff was thereby assured by the Railway Passengers Assurance Company in the sum of 1000*l.*, to be payable to his legal representatives in the event of death happening to the assured from railway accident whilst travelling in any class carriage on any line of railway in Great Britain or Ireland; or a proportionate part of the 1000*l.* will be paid to the assured himself in the event of his sustaining any personal injury by reason of such accident. The plaintiff was travelling in a railway carriage to a certain place, and on the arrival of the train at the railway station there, and after it had stopped, the plaintiff, in stepping out of the carriage, without any negligence on his part, slipped off the iron step, whereby he sustained an injury:—*Held*, first, that this was a "railway accident" within the meaning of the contract of assurance.

Secondly, that the damage could not be estimated by the proportion which the injury bore to the amount payable on loss of life.

Thirdly, that the plaintiff was entitled to recover damages for the expense and suffering occasioned by the injury, but not for his loss of

time or loss of profit. *Theobald v The Railway Passengers Assurance Company*, 45

PASSENGERS' LUGGAGE.

See RAILWAY COMPANY, (1).

PATENT.

In an action for the infringement of a patent, the 43rd section of the 15 & 16 Vict. c. 83, makes the certificate of the Judge who tried the cause, that the defendant's particulars of objections have been proved by the defendant, a condition precedent to his right on taxation to any costs in respect of such particulars, even in the case of a nonsuit. *Honiball v. Bloomer*, 538

PAYMENT.

See PRINCIPAL AND AGENT.

To an action by indorsee against acceptor of a bill of exchange for 55*l.* the defendant pleaded, that he accepted the bill for the accommodation of the drawer, and without consideration; that the drawer indorsed it with other bills to the plaintiffs as a security for the repayment of 30*l.* then advanced by them to the drawer, and that after action the plaintiff's claim on the bill was satisfied and discharged by payment to them, by the acceptor of one of the other bills, of the sum of money so advanced, and all interest thereon; and that from thence hitherto the plaintiffs held and still hold the bill declared on, without value or consideration:—*Held*, on demurrer, that the plea was bad, both on the ground that it did not answer the damages in the action, and also, that the payment relied on as made by a stranger was not alleged to have been made *for and on account of* the debt.



him of the bill, or for the plaintiff being the holder thereof: Secondly, as to 17*l.*, a tender of that amount:—*Held*, on motion for judgment non obstante veredicto, that the first plea, though informal, was good in substance, since it confessed a *prima facie* title in the plaintiff by indorsement, and avoided it by shewing that he was the holder of the bill for a special purpose only, and without consideration.

Also, that the second plea was bad, for the acceptor of a bill of exchange cannot plead a tender after the day of payment.

A plea of tender ought not to be joined with a plea containing a denial of the right of action for the same sum. *Dobie v. Larkan*, 776

PLEADING.

See BRISTOL WATER WORKS COMPANY.
GAME.
GAMING CONTRACT.
ISSUABLE PLEA.
WAGER.
WAX, (2).

PLEADING SEVERAL MATTERS.

See EQUITABLE DEFENCE.

POLICY OF ASSURANCE.

(1). *Causa proxima*.

To a declaration on a policy of assurance on advances for the transport of Chinese emigrants from China to Peru, for their outfit and provisions, to be paid on the arrival of the emigrants at the port of destination, the perils insured against being "pirates, rovers, thieves &c., barratry of the master and mariners, and all other perils, losses, and misfortunes, &c.," in the usual form; the declar-

ation alleging a total loss by the emigrants piratically and feloniously murdering the captain and part of the crew, and feloniously stealing and carrying away the ship—the defendants pleaded, first, that, as soon as the emigrants had committed the murder and had obtained possession of the vessel, they steered for the nearest land, for the purpose of being landed, and refused to and would not proceed upon the voyage; and the vessel was then fit and able safely to proceed to the said port, and the remainder of her crew could have navigated her there, and were ready and willing to convey the emigrants there if they would have gone, but that they would not; and that, by reason of such refusal, and for no other cause whatsoever, the transport was never completed.

Secondly, as to the taking and carrying away of the vessel, that the emigrants were unwilling to be carried on the said voyage, and that they committed the murder and took possession of the vessel for the purpose of being landed and of escaping and from being carried on the voyage, and for no other purpose, which is the said piratical carrying away of the vessel.

Held, on error, affirming the judgment of the Court below, that the murder of the captain and part of the crew, and the seizure of the vessel by the emigrants, as alleged in the declaration and admitted by the pleas, was, if not a piratical act, one ejusdem generis, and therefore within the perils insured against; and that, as the loss was complete at that moment and was never reduced, the unwillingness of the emigrants to proceed was not the cause of the loss, but was wholly immaterial; and consequently that the pleas were bad. *Palmer v. Naylor*, 382



PRINCIPAL AND AGENT.

Where a principal authorises his agent to pledge his credit, and the latter makes a purchase on his behalf, and thereby creates a debt, the principal is not discharged by payment to the agent, if the money is not paid over to the seller, unless the latter, by his conduct, makes it unjust that the principal should be sued; as, for example, where the seller by his words or conduct induces the principal to believe that a settlement has been come to between the seller and the agent, in consequence of which the principal pays the amount of the debt to the agent.

To an action for goods sold, the defendant pleaded that the purchase was made by one T., the defendant's agent, and that the defendant, within a reasonable time after the sale, and not unduly early, bonâ fide paid T. sufficient money to pay the plaintiffs:—*Held*, on demurrer, that the plea was bad. *Heuld v. Kenworthy*, 739

PRINCIPAL AND SURETY.

See BOND.

GUARANTEE.

INTERROGATORIES, (3).

PRIOR PUBLICATION.

See LIBEL.

PROHIBITION.

See COUNTY COURT, (1).

PROHIBITORY STATUTE.

See CONVEYANCER.

PROMISSORY NOTE.

See USURY, (2).

PROPRIETOR.

See COPYRIGHT.

RAILWAY COMPANY.

See CARRIER.

PASSENGERS ASSURANCE
COMPANY.

(1). *Validity of Bye Law.—Passengers' Luggage.*

The 169th section of the 5 & 6 Will. 4, c. cvii., which incorporated the Great Western Railway Company, enacts, "that, without extra charge, it shall be lawful for every passenger travelling upon the railway to take with him articles of clothing not exceeding forty pounds in weight and four cubic feet in dimensions; and that the company shall in no case be responsible for any things whatsoever carried upon the railway with any passenger, other than such passenger's articles of clothing, not exceeding the weight and dimensions aforesaid; Provided that nothing herein contained shall extend to make liable the company further than where, according to law, stage coach proprietors and common carriers would be liable." Section 144 enables the company to make bye-laws "for the good government of the affairs of the company, and for the management of the said undertaking." The company made a bye-law, that every first-class passenger should be allowed to carry 112 pounds of luggage free of charge, but that the company would not be responsible for the care of the same, unless booked and the carriage thereof paid for:—*Held*, that the company had no power to make the bye-law, since it was in contravention of the 169th section. *Williams v. The Great Western Railway Company*, 15

RAMSGATE HARBOUR
ACTS.

See LOCAL AND PERSONAL ACTS.

RATE.

See CHURCH.

RATIFICATION.

See INFANT.
PAYMENT.
SET OFF.

REDEMPTION OF LAND
TAX.

See LAND TAX.

REGULÆ GENERALES.

I. Rule applying provisions as to pleadings and practice in Common Law Procedure Act, 1852, the Regulæ Generales of Hilary Term, 1853, and the Pleading Rules which came into operation on the first day of Trinity Term, 1853, to the Common Law Procedure Act, 1854, 398

II. Rule directing affidavits to be made in the first person, and to be divided into paragraphs. *Ib.*

1. Issue of fact to be tried by a Judge without a jury. 399

2. Subpœna thereon and in other cases. *Ib.*

3. Nisi Prius Record therein. *Ib.*

4. Postea therein, on a verdict for plaintiff on all the issues, where the cause is tried in London or Middlesex, and where the defendant appears at the trial. *Ib.*

5. The like, where the trial was at the Assizes. 400

6. The like, where one issue is found for the plaintiff and another for the defendant, the latter going to the whole action. *Ib.*

7. Judgment thereon for plaintiff, 401

8. Execution thereon. 401

9. Writs of execution where the Court or a Judge decides on matters of account. *Ib.*

10. Writs of execution where matter of account is referred to and decided on by an arbitrator, officer of the Court, or county court judge. 402

11. Special case for the opinion of the Court under section 4 of the Common Law Procedure Act, 1854, where the allowance or disallowance of a particular item or items depends on a question of law. *Ib.*

12. Issue to be tried by a jury where the Court or Judge has directed it, under section 4, where the allowance or disallowance of a particular item or items depends on a question of fact. 403

13. Postea thereon. *Ib.*

14. Special case stated by an arbitrator under sect. 5 of the Common Law Procedure Act, 1854. *Ib.*

15. Judgment thereon when a judgment has been ordered. 404

16. Postea, where the Judge upon the trial of an issue in fact before him, under sect. 1, directs an arbitration as to part of the claim under sect. 6 of the Common Law Procedure Act, 1854. *Ib.*

17. Writ of Habere Facias Possessionem on a rule to deliver possession of land pursuant to an award. 405

18. Judgment for the plaintiff on a special case stated under section 32 of the Common Law Procedure Act, 1854. 406

19. Judgment of affirmance by the Court of Error in Exchequer Chamber on a special case. *Ib.*

20. Judgment of reversal in the like case. 407

21. Judgment of Court of Appeal in Exchequer Chamber on a disposal of the appeal in the plaintiff's favour where judgment for him had been

given in the Court below, under the 41st and 42nd sections of the Common Law Procedure Act, 1854. 407

22. *Fi. fa.* against a garnishee, under the 63rd section of the Common Law Procedure Act, 1854, where debt not disputed or garnishee does not appear. 408

23. *Ca. sa.* in the like case. 409

24. Writ against garnishee to shew cause why the judgment creditor should not have execution against him for the debt disputed by him. *Ib.*

25. Declaration thereon. 410

26. Plea thereto. 411

27. Issue thereon. *Ib.*

28. *Postea* thereon. *Ib.*

29. Judgment for plaintiff therein. *Ib.*

30. *Fi. fa.* therein. *Ib.*

31. *Ca. sa.* therein. 412

32. Judgment for plaintiff after verdict that a mandamus do issue, under section 71 of the Common Law Procedure Act, 1854. 413

33. Writ of inquiry to ascertain the expense incurred by the doing of an act, and for the doing of which a mandamus was issued. *Ib.*

34. Writ of execution in detinue,

RENT.

See DEVISE, (2).

STATUTE OF LIMITATIONS, (2).

RENT-CHARGE.

See COSTS, (3).

STATUTE OF LIMITATIONS, (2).

REPLEVIN.

See COSTS, (3).

REPLICATION.

See STATUTE OF LIMITATIONS, (1).

REPUTED OWNERSHIP.

See BANKRUPT, (1).

REVENUE.

See EVIDENCE, (1).

RIGHT OF WAY.

See WAY.

RIVER.

See SHIP.

SECONDARY EVIDENCE.

See EVIDENCE, (2).

SECURITY ON LAND.

See USURY.

SEQUESTRATION.

In the year 1836, the archdeaconry of Dorset was, by order in council, dissevered from the diocese of Bristol, and annexed to the diocese of Salisbury. After the annexation, S., who had been registrar of the Bishop of Bristol, continued to act as registrar under the Bishop of Salisbury. In the year 1840, a writ of sequestration against the rector of a parish within the archdeaconry was directed to the then Bishop of Salisbury, and delivered to S. Sequestrators were appointed under the seal of the bishop, and the writ remained in the office of S. That Bishop of Salisbury having died, and a new bishop having been appointed,—*Held*, first, that the succeeding bishop was bound to return the writ directed to his predecessor. Secondly, that, although the writ, if directed to the Bishop of Bristol, might have been valid by the 6 & 7 Will. 4, c. 77, s. 20, yet that, under the above circumstances, it was too late to object to the form of the writ.

Semble, that the 10 & 11 Vict. c. 98, which provides for the saving of the powers of the Ecclesiastical Courts, does not apply to the act of issuing a sequestration upon a fieri facias de bonis ecclesiasticis by a bishop, in which he acts as ecclesiastical sheriff. *Phelps v. St. John*, 895

SET OFF.

See BILL OF EXCHANGE, (2).
CONTRACT, (3).

It is a good answer to a plea of

set-off, that the amount has been paid by a person professing to act as agent for and on account of the plaintiff, though without his authority; and that the latter ratified the act at the time of the trial.

The treasurer of a corporation paid their clerk (the defendant) the amount of his year's salary, both parties believing at the time that the treasurer had the authority of the corporation to make such payment; but the treasurer had no such authority, and the corporation afterwards repudiated the payment and dismissed the defendant from their service. In an action against the defendant for the recovery of certain monies paid to him on account of the corporation:—*Held*, that the corporation was entitled, at the trial, to ratify the act of their treasurer, and, consequently, that the defendant could not set off the amount of his salary as due to him from the corporation. *Simpson v. Eggington*, 845

SETTLEMENT.

See BANKRUPT, (5).
STAMP, (2).

SEVERAL MATTERS.

See EQUITABLE DEFENCE.

SHAREHOLDER.

See BANKRUPT, (5).

SHARES.

See MINING COMPANY.

SHIP.

See BARRATRY.
CHARTERPARTY.

(1). *Liability of Owner.*

Where a vessel is sunk by unavoidable accident in a public navi-

gable river, whether in the usual track of navigation or not, it is the duty of the owner, so long as he continues to have the possession and control of the vessel, to take due precaution to prevent injury to other vessels by their striking against it; and this obligation may be transferred with the transfer of the possession and control to another person; and, on the abandonment of the possession and control, the obligation ceases. *White v. Crisp*, 312

(2). *Liability of Owner for
Necessaries.*

Several sailors on board a merchant vessel, having met with a serious accident in weighing the vessel's anchor, were taken on shore by the captain to the plaintiffs, a public-house, the captain telling the plaintiff that the owner of the vessel would pay for what the sailors had. The captain immediately afterwards hired some fresh hands, and proceeded on the voyage. At the time the sailors were entrusted to the care of the plaintiff, there was no probability that they would be able to resume their duties for that voyage, and they remained at his house

SPECIAL INDORSEMENT.

See WRIT OF SUMMONS.

STAKE HOLDER.

See WAGER.

STAMP.

(1). *Conveyance—"Property."*

The assignment, by deed, of the *goodwill* of a trade, is a conveyance of "property" within the Stamp Act, 13 & 14 Vict. c. 97, Sched. tit. "Conveyance," and, as such, is liable to ad valorem duty. *Potter v. The Commissioners of Inland Revenue*, 147

(2). *Settlement of "definite and certain Sum."*

The assignment to trustees of a marriage settlement, of a policy of insurance effected on the settlor's life for a sum named, and all monies assured or to become payable by or under the policy, is not liable to the payment of ad valorem duty under the 13 & 14 Vict. c. 97, Sched. "Settlement," as being a deed whereby any *definite and certain* principal sum of money is settled. *Sanville*

them so affixed for a long time, without the knowledge of the plaintiffs, by means whereof large quantities of the plaintiffs' gas flowed out of their pipes; that the defendants, maliciously contriving to prevent the plaintiffs from discovering the trespasses so committed till six years should have elapsed, fraudulently, and without the plaintiffs' knowledge, cut off from the plaintiffs' gas pipes the gas pipes of the defendant so affixed thereto, and fraudulently, and without the plaintiffs' knowledge, stopped and plugged up the gas pipes of the plaintiffs where the gas pipes of the defendants had been so affixed: by means whereof the plaintiffs were prevented from discovering the trespasses until six years from their commission had elapsed, and thereby the remedy of the plaintiffs by action became barred:—*Held*, that the count disclosed a good cause of action. *The Imperial Gas Light and Coke Company v. The London Gas Light Company*, 39

(2). *Rent*.

The limitation prescribed by the 3 & 4 Will. 4, c. 27, does not apply to an action on a collateral covenant for payment of a rent charged on land, and the covenantee may recover damages for the breach of that covenant, notwithstanding his right to recover the rent-charge is barred by the above statute. *Manning v. Phelps*, 59

(3). *Agreement amounting to Part Payment*.

In 1833, the plaintiff married, at which time his wife was the holder of a promissory note made by the defendant, and which had been given to her whilst sole. In 1834 the plaintiff's wife died, after giving birth to a child. It was then agreed between the plaintiff (who claimed the note as the representative of his late wife, and the defendant, that the

latter should maintain the child, and that in consideration thereof the defendant should receive the rents of certain cottages which had been the property of the plaintiff's wife, and that he should also retain the interest to become payable on the note. In 1839, the defendant signed an indorsement on the note, to the effect, that all interest upon the note was then paid. The defendant continued to maintain the child to the time of its death in 1848. In 1853 letters of administration were granted to the plaintiff; and, subsequently, in the same year, the plaintiff brought the action on the note:—*Held*, per *Alderson*, B., *Platt*, B., and *Martin*, B., (dubitante *Purke*, B.), first, that the agreement between the plaintiff and the defendant, that the future maintenance of the child should be taken in part payment of the interest upon the note, and which had been acted upon within six years before action brought, was a sufficient payment of interest within the proviso of the 2nd section of the 9 Geo. 4, c. 14: Secondly, that the contract being with a person acting on behalf of intestate's estate and for its benefit, the administration had relation back to what was done after the death of the intestate and before the grant of letters of administration, so as to entitle the plaintiff to sue as administrator on a promise made to him as such. *Bodger v. Arch*, 333

(4). *Admission of Title*.

By indenture dated the 27th of October, 1827, between the defendant of the one part, and the plaintiff of the other part, after reciting that certain copyhold premises were surrendered to the plaintiff for securing repayment of 300*l*. by him that day lent to the defendant, the plaintiff covenanted, on repayment of that sum and interest on the 27th of April, 1828, to surrender the pre-



rejected within seven days after the delivery of the abstract of title: Provided, that the said solicitor shall be at liberty to accept or reject such title at his own option; but, if the same is rejected, and no advance shall have been made, then the agreement to be null and void. 13thly, that, if the defendant shall give the plaintiff one month's notice in writing of any sum of money to be advanced to him under the agreement, and he shall not take up the money at the expiration of the notice, 4l. per cent. interest shall be payable by the defendant to the plaintiff in respect of the sum specified in such notice from the day such notice shall expire, in the event of the defendant, at any time thereafter, requiring an equal or larger advance; and if he shall only require a smaller advance, then such interest as aforesaid, from the time aforesaid, shall be payable on such smaller sum. 17thly, that, if the defendant shall at any time be desirous of paying off the advances made to him, or any portion of them, it shall be lawful for him so to do, upon giving two calendar months' notice in writing to the plaintiff of his intention, and the plaintiff agrees to accept the same; but such payment or payments shall not in any way interfere with or annul the 5th article of this agreement:—*Held*, first, that the deed was not, upon the face of it, usurious, inasmuch as the premium of 1l. per cent. was not to be paid for forbearance of a loan, but as a compensation for the agreement to be ready to advance the 15,000l. in the manner required; Secondly, that an advance of some money was not a condition precedent to the obligation to pay the 1l. per cent.:—per *Parks*, B., and *Martin*, B.; *Platt*, B., dissentiente.

Held, also, that where money is lent at usurious interest on personal security, as well as on security on

land, the contract is altogether void, and is not protected, as to the personal security, by the 2 & 3 Vict. c. 37. *Fussell v. Daniel*, 581

(2) *Promissory Note.*

A declaration stated, that, in consideration the plaintiff would discount the joint and several promissory note for 700l., payable three months after date, of the defendant and one H. S., the defendant promised the plaintiff, in the event of the note not being paid at maturity, to pay him interest on the amount of the note, at the rate of 1s. in the pound per month: The declaration then alleged, that the plaintiff did then discount the said note, and that it was not paid at maturity, and still remained unpaid; and laid as a breach the non-payment by the defendant of certain of the monthly instalments. Plea: that it was corruptly agreed between the plaintiff, the defendant, and H. S., that the plaintiff should discount the note, and, as the proceeds of such discounting, advance to the defendant 595l. only, and that the plaintiff should receive for such advance the amount of the note on its arriving at maturity, and that the plaintiff should give further day of payment of the amount of the note for an indefinite period, to commence when the note should become due; and that, for the forbearing of payment of the sum of 595l., the defendant should pay the plaintiff 105l., being the difference between 700l. and 595l., three months after the advance, and for the forbearing of payment on the sum of 700l. so made up, such sum of 1s. in the pound per month, on the sum of 700l., payable monthly as in the declaration mentioned. The plea then alleged, that, to secure the said loan and interest thereon, the defendant agreed to confess, and did confess a judgment against himself

to the plaintiff for 1400*l.*, and that the said judgment was duly registered in the Court of Common Pleas, in the mode provided for by the statute in order to affect the lands, tenements, and hereditaments of the defendant:—*Held*, that the plea was bad, the agreement relied upon not being usurious; and that, as the transaction was based on a promissory note, the whole transaction was rendered legal by the 3 & 4 Will. 4, c. 98, s. 7. *Semple v. Cornewall*. 617

WAGER.

See BILL OF EXCHANGE, (2).

To an action for money had and received, the defendant pleaded, that the money had been deposited by the plaintiff in the defendant's hands, as stakeholder, to abide the event of a certain illegal game, on which event the money had been wagered by the plaintiff. Replication, that, before the result of the wager was ascertained, the plaintiff repudiated the wager, and required the defendant to repay the money to him:—*Held*, on demurrer, that the replication was good, and that the plea was bad for not alleging that the wager had been determined. *Martin v. Hewson*, 737

WARRANT OF ATTORNEY.

See INSOLVENT.

WARRANTY.

An agreement for the sale and delivery of certain oil, described as "foreign refined rape oil, warranted only equal to samples," is not complied with by the tender of oil which is not "foreign refined rape oil," although it be equal to the quality of the samples. *Nichol v. Godts*, 191

WASTE.

See COMMON.

WAY.

WATERWORKS.

See BRISTOL WATERWORKS.

WAY.

(1). *User "as of Right."*

In 1823, M. built two adjoining houses, behind each of which was a piece of ground appropriated as a yard, but no wall divided the yards. In 1832, M. permitted the defendant to occupy one of the houses without payment of rent, and he was accustomed to pass over the yard of the other house, which was let from time to time to different tenants, to a public highway. M. continued owner of both houses until his death in December, 1838. In August, 1839, the trustees under his will conveyed the last-mentioned house and the ground behind it to a person through whom the plaintiff derived his title. In September, 1839, the trustees conveyed the other house and ground to the defendant, who continued to occupy it, and use the way across the plaintiff's yard without interruption until the year 1853:—*Held*, that there was no user of the way "as of right" for twenty years, within the meaning of the 2 & 3 Will. 4, c. 71, s. 2. *Windship v. Hudspeth*, 5

(2). *Of Necessity.*

A right of way of necessity can only arise by grant, express or implied.

Where, to an action of trespass qu. cl. fr., the defendant pleaded, that one N. S., until and at the time of his death, was seised as well of the said close in which, &c., holden by him of the manor of H., as also of another adjoining close, called Y., holden of the manor of T.; and that the said N. S. had no way to close Y. except over the said close in which, &c.; and that on his death the said closes respectively escheated to the lords of the manors of H. and

WITNESS.

T., and that the lord of T., by virtue of the premises, from and after the death of the said N. S., until and at the time when, &c. necessarily had and still of right ought to have a certain necessary way on foot, &c. over the said close, &c., to and from the said close called Y., at all times of the year, for the necessary use and occupation of the close called Y., the same being such way as had been and was used in the lifetime, and until and at the time of the death of the said N. S., and the most convenient way over the said close, in which, &c., to the said other close. The plea then justified the trespasses as the servant of the lord of the manor of T. :—*Held*, on the motion for judgment non obstante veredicto, that the plea was bad.

Held, also, that, assuming title by escheat to be equivalent to title by grant, the plea was bad in not averring that the lord of the manor of T. had no other way at the time of the trespass. *Proctor v. Hodgson*, 824

WEIGHTS AND MEASURES.

. A contract for the sale of a certain number of tons of iron by the ton "long weight," is not in contravention of the stats. 5 & 6 Will. 4, c. 63, and the 5 Geo. 4, c. 74; and consequently such contract is valid. Per *Pollock*, C. B., *Platt*, B., and *Martin*, B.; *Parke*, B., dubitante. *Jones v. Giles*, 119

WILL.

See DEVISE.

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See EVIDENCE, (1).
INTERROGATORIES.

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WRIT OF SUMMONS.

See DECLARATION.

(1). *Special Indorsement.*

In an action on a bill of exchange, the writ was specially indorsed for 31*l.* 8*s.* 9*d.* "being balance of principal, interest, and expenses of noting, due on a bill of exchange for 75*l.* 9*s.* dated &c. :—*Held*, that the expenses of noting were not "a liquidated demand" within the 27th section of the Common Law Procedure Act, (1852), 15 & 16 Vict. c. 76, and consequently, that the indorsement was irregular, and the plaintiff was not entitled to sign final judgment under the 29th section, on the failure of the defendant to enter an appearance within the specified time. *Rogers v. Hunt*, 474

(2). *Indorsement of Interest.*

The 25th section of "The Common Law Procedure Act, 1852" which enables a plaintiff to make on the writ of summons a special indorsement of his claim, *with interest*, is not confined to cases in which interest is payable by contract, express or implied. Therefore, where a plaintiff by such indorsement claimed interest on an I. O. U., and in default of appearance signed judgment:—*Held*, that the judgment was regular.

But, in all cases, except of those of bills of exchange and promissory notes, if a plaintiff, by such indorsement, claims interest where it is not due by contract, express or implied, and on default of appearance signs judgment for it, the Court will set aside the judgment, and make the attorney pay the costs. *Rodway v. Lucas*, 667









